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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

MARY ELLEN KIMBLE
Petitioner,

v.

THE WORTH COUNTY R-III BOARD
OF EDUCATION
Respondent.

WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS, WESTERN DISTRICT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Is the Missouri statute providing for dismissal of a teacher for "immoral conduct" unconstitutionally vague?

2. Was the Missouri statute providing for dismissal of a teacher for "immoral conduct" unconstitutionally applied by the court below since that court failed to adequately determine whether there was a nexus between the teacher's alleged misconduct and her fitness to teach?

3. Was the termination of the teacher in retaliation for the exercise of her right to freedom of speech thereby violating the first and fourteenth amendments?

4. Was the decision which was adverse to the teacher violative of her due process rights since important evidence supporting her was not considered?

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OPINIONS BELOW

The Findings of Fact and Decision of the Worth County R-III Board of Education dated May 10, 1982, is unreported and is set out in the Appendix at A-48 to A-58. The Judgment of the Circuit Court of Worth County, Missouri, Division I, dated June 24, 1982, is also unreported, and is set forth in the Appendix at A-44 to A-47. The judgment of the Missouri Court of Appeals dated March 20, 1984, is reported at 669 S.W.2d 949 and is set forth in the Appendix at A-1 to A-43. The Order of the Supreme Court of Missouri denying transfer dated June 19, 1984, is set forth in the Appendix at A-59 to A-60.

JURISDICTION

The judgment of the Missouri Court of Appeals, Western District, reversing the decision of the Circuit Court of Worth County, Missouri, to reverse the School Board and reinstate Ms. Kimble was entered on March 20, 1984. The Court of Appeals denied a timely filed motion for rehearing or transfer to the Missouri Supreme Court on May 1, 1984. The Missouri Supreme Court, on June 19, 1984, denied a motion for transfer to that court. The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(3) (1976).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

U.S. Const. Amend. I:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. Amend. V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV § 1:

No State shall . . . deprive any person of life, liberty, or property, without due process of law[.]

Mo. Ann. Stat. § 168.114 (Vernon Supp. 1984):

1. An indefinite contract with a permanent teacher shall not be terminated by the board of education of a school district except for one or more of the following causes:

(1) Physical or mental condition unfitting him to instruct or associate with children;

(2) Immoral conduct;

(3) Incompetency, inefficiency or insubordination in line of duty;

(4) Willful or persistent violation of, or failure to obey, the school laws of the state or the published regulations of the board of education of the school district employing him;

(5) Excessive or unreasonable absence from performance of duties; or

(6) Conviction of a felony or a crime involving moral turpitude.

2. In determining the professional competency of or efficiency of a permanent teacher, consideration should be given to regular and special evaluation reports prepared in accordance with the policy of the employing school district and to any written standards of performance which may have been adopted by the school board.

STATEMENT OF THE CASE

This petition asks this Court to consider whether various constitutional rights of a teacher who was dismissed by a School Board were violated by the Board and by the statute providing for dismissal for "immoral conduct." Those rights include freedom of speech and due process.

The Petitioner (hereinafter Ms. Kimble) had been employed by the Worth County, Missouri, R-III Board of Education (hereinafter the Board) for a number of years in the capacity of librarian with some teaching duties. She had consistently received good evaluations. During the 1981-82 school year she was elected by her fellow teachers to a position of trust and confidence as Secretary-Treasurer of the Community Teacher's Association (hereinafter C.T.A.).

In November of 1981 she was requested by her fellow members of the C.T.A. to inquire as to the reason why the C.T.A. dues of the administrators of the Worth County R-III School District were paid by the Board, but the dues of the teachers were not. She did inquire concerning the issue to her friend and neighbor who was President of the Board. (See A-93 to A-95) Evidence shows that when the Superintendent found out about this, he summoned Ms. Kimble to his office, threatened to take her teaching certificate, and told her that he would love to slap her with an unprofessional conduct suit. Id. He stated thereafter that he was going to get rid of Ms. Kimble.

Shortly thereafter, on March 1, 1982, he brought charges pursuant to a statement of charges dated February 28, 1982, against Ms.

Kimble alleging that she was guilty of "immoral conduct" in violation of M.A.S. § 168.114.1(2) (Vernon 1965), authorizing dismissal on that ground. (See A-61 to A-65) In addition to setting forth Ms. Kimble's constitutionally protected inquiry of the Board President, the statement listed as a ground for dismissal an allegation that Ms. Kimble had ordered a book for the school without having signed a request form or purchase order. Id. The statement also listed as grounds for dismissal a number of trivial incidents in which items of extremely low value had disappeared from the school premises and were later returned. These items included a teapot in the 1973-74 school year, a battery jar in the 1974-75 school year, gate receipts in the 1976-77 school year, Avon jewelry in the 1977-78 school

year, a cookbook in the 1980-81 school year, and a set of books in 1982. Id. The evidence linking Ms. Kimble to those incidents was conflicting and weak.

The circumstances therefore strongly indicate that Ms. Kimble was dismissed because of her constitutionally protected speech, and the other asserted grounds were merely pretextual. This issue was raised before the Missouri Court of Appeals by Ms. Kimble in her initial brief wherein it is stated: "It is important to recognize when reading the testimony of the administrators that each has an axe to grind because of [Ms. Kimble's] activities with the C.T.A." Additionally, in Ms. Kimble's "Suggestions in Support of Motion for Rehearing" she stated: "The only evidence [that she was unfit to teach] was generalities stated by the school

administrators who were out to get her because of her activities with the C.T.A."

Important evidence which might have caused the Board and court below to have reached a conclusion favorable to Ms. Kimble was not considered at all. Among the allegations against Ms. Kimble was an accusation that she had taken and subsequently returned by check twenty dollars in gate receipts received during a basketball game. (See A-62) Ms. Kimble denied either taking or replacing the money and submitted as evidence to the Board all of her cancelled checks from the period of time in question. Since no twenty dollar checks to the school were written during that period, this evidence strongly corroborated Ms. Kimble's testimony. However, while the cancelled checks were in the possession of the Board, one twenty

dollar check disappeared, thus leaving doubts in the minds of the Board members as to Ms. Kimble's truthfulness. For example, Judge Anthony P. Nugent, of the Missouri Court of Appeals, in his concurring opinion, stated:

> Her bank statements and checks for December, 1976 and January, 1977, were admitted into evidence. Although no twenty dollar check to the school was included in the exhibits, the December, 1976 bank statement shows that two twenty dollar checks were written. Only one of these twenty dollar checks is included in the exhibits.

(See A-30)

After the hearing before the Board, two bank employees signed affidavits showing that none of the cancelled twenty dollar checks from the period in question were written to the school. (See A-66 to A-69) Ms. Kimble and her husband attested to the fact that none of the checks submitted as evidence were written for twenty dollars to the school.

(See A-70 to A-72)

At the hearing before the Board several persons testified as to Ms. Kimble's fitness to teach. Judy Hoakinson, a fellow teacher of Ms. Kimble's, testified that the incident regarding the gate receipts was not a problem and that Ms. Kimble got along wonderfully with the teachers. (See A-76 to A-77) Another teacher, Ann Waldeir, who had taught there for sixteen years, testified that Ms. Kimble was a good librarian and that the teapot incident did not affect her teaching ability. (See A-77 to A-85)

On the other hand, the administrators who testified talked only in general terms. Principal Findley testified that the instances of alleged takings by Ms. Kimble added caution to the principal's job. (See A-86 to A-87) Superintendent Bruner stated

that the situation regarding the missing set of books "disrupts the school." (See A-87 to A-90) Ex-Superintendent Burmeister said that the teapot incident had "a negative effect." (See A-92) Specific facts were not set out in this testimony.

Furthermore, as discussed above, Ms. Kimble had consistently received good evaluation reports, and her fellow teachers had honored her to a position of trust and confidence as secretary/treasurer of the C.T.A.

Counsel for Ms. Kimble raised the issues of the facial invalidity of the statute and its invalidity as applied in its original brief before the Missouri Court of Appeals. The issue as to the denial of due process because of failure to consider important evidence was raised in the "Motion for Rehearing Or in the Alternative, to Transfer to the

Supreme Court of Missouri," and in the "Suggestions in Support of Respondent's Application for Transfer of Cause . . . to the Supreme Court of Missouri."

ARGUMENT

I. IN HOLDING THAT THE MISSOURI STATUTE ALLOWING TERMINATION OF A TEACHER FOR "IMMORAL CONDUCT" IS NOT UNCONSTITUTIONALLY VAGUE, THE MISSOURI COURT OF APPEALS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW IN A MANNER INCONSISTENT WITH PRIOR DECISIONS OF THIS COURT AND IN CONFLICT WITH DECISIONS OF AT LEAST ONE FEDERAL COURT OF APPEALS.

A basic principal of the due process clause of the Fourteenth Amendment is that a statute is void for vagueness if its prohibitions are not clearly defined. In Grayned v. City of Rockford, 408 U.S. 104 (1972), this court set forth the reasons vague laws are offensive to the Constitution among which are the fact that they give inadequate notice of exactly what activities are prohibited, and that they can give rise to arbitrary and discriminatory enforcement.

This Court stated in Keyishian v. Board

of Regents of University of State of New York, 385 U.S. 589, 604 (1967), that a statute is unconstitutionally vague when "men of common intelligence must necessarily guess at its meaning and differ as to its application." Cf. Bagget v. Bullitt, 377 U.S. 360, 367 (1964). The word "immoral" in M.A.S. § 168.114 (Vernon Supp. 1984) falls within that definition and is therefore violative of the due process clause of the Fourteenth Amendment.

Prior decisions of this Court indicate that statutes generally proscribing "immoral conduct" are unconstitutionally vague. For example in Holmby Productions, Inc. v. Vaughn, 350 U.S. 870 (1955), in reversing the state court decision at 177 Kan. 728, 282 P.2d 412 (1955), this Court in a per curium opinion held that the words "cruel, obscene,

indecent or immoral, or such as tend to debase public morals," 282 P.2d at 413 (emphasis added), as used in a statute pertaining to the duties of the Kansas State Motion Picture Review Board, were unconstitutionally vague. Similarly, in Superior Films, Inc. v. Department of Education of State of Ohio, 346 U.S. 587 (1954), this Court reversed decisions of courts in New York and Ohio and invalidated statutes of those states giving motion picture censors powers to refuse licensing to a motion picture which is "immoral or is of such character that its exhibition will tend to corrupt morals," Commercial Pictures Corp. v. Board of Regents of University of State of New York, 305 N.Y. 336, 113 N.E.2d 502, 507 (1953) (emphasis added), or which is not "of a moral educational or amusing and harmless

nature." Superior Films v. Dept. of Education, Etc., 159 Ohio St. 315, 112 N.E.2d 311, 314 (1953) (emphasis added).

There is no reason why such a conclusion should not be reached with regard to "immoral conduct" as a ground for dismissal of a teacher. The Ninth Circuit reached such a conclusion in Burton v. Cascade School District Union High School No. 5 et al., 353 F. Supp. 254, 255 (D. Or. 1973), aff'd, 512 F.2d 850 (9th Cir.), cert. denied, 423 U.S. 839 (1975). The district court had invalidated such a statute using the following powerful language:

> Immorality means different things to different people, and its definition depends on the idiosyncracies of the individual school board members. It may be applied so broadly that every teacher in the state could be subject to discipline. The potential for arbitrary and discriminatary enforcement is inherent in such a statute.

The Court then cited United States v. Reese, 92 U.S. 214 (1875), recognizing the

danger of allowing legislatures such unbridled discretion, and the Court went on to state:

> A statute so broad makes those charged with its enforcement the arbiters of morality for the entire community. In doing so, it subjects the livelihood of every teacher in the state to the irrationality and irregularity of such judgments. The statute is vague because it fails to give fair warning of what conduct is prohibited and because it permits erratic and prejudiced exercises of authority.

353 F. Supp. at 255 (footnote omitted). The Court concluded: "No amount of statutory construction can overcome the deficiencies of this statute." Id.

Thus, the lower court decision in this case conflicts with the prior holdings of this Court and the Ninth Circuit. The Missouri Court of Appeals relied on Thompson v. Southwest School District et al., 483 F. Supp. 1170, 1179 (W.D. Mo. 1980), in which

the court, while having serious concerns about whether the term "immoral" in the abstract is unconstitutionally vague, held that such a statute is valid provided that it is interpreted so as to allow dismissal only in those instances where the immoral conduct adversely affects a teacher's performance.

Statutes or ordinances using the term "immoral" have been invalidated on vagueness grounds by federal courts in numerous other cases. Cases invalidating criminal statutes on the ground that the word "immoral" is unconstitutionally vague should be equally applicable here. In Thompson the court held that because of the penal nature of teacher dismissal statutes and because of the property interest in continued employment acquired by teachers under an indefinite contract, the standards for determining

whether such a statute is unconstitutionally vague are the same as those involved in the criminal area.

One case in which a statute using the word "immoral" was found to be unconstitutionally vague is Morgan v. City of Detroit, 389 F. Supp. 922 (E.D. Mich. 1975), in which the court invalidated a portion of an anti-prostitution ordinance which prohibited "leud" and "immoral" acts. In holding the term "immoral" to be unconstitutionally vague, the court stated:

> Assuming there may be a rough consensus in our society as to certain acts that are beyond the pale of the moral, such generalizations are constitutionally too indefinite for criminal prohibition.

389 F. Supp. at 930.

Similarly, in Corporation of Haverford College v. Reeher, 329 F. Supp. 1196 (E.D. Pa. 1971), the court invalidated a statute

denying college financial aid to anyone convicted of a misdemeanor involving "moral turpitude." The court noted that the quoted phrase "tells us very little about what misdemeanors trigger the loss of financial aid eligibility." 329 F. Supp. at 1206. The court went on to state: "If the state insists on legislating morality, we will insist at least that it spell out its moral code . . . ." Id. The court then invalidated the statute for vagueness.

Other cases invalidating similar statutes on vagueness grounds include Ricks v. District of Columbia, 414 F.2d 1097 (D.C. Cir. 1968) (vagrancy statute using the phrase "leading an immoral and profligate life"); Gregory v. Gaffney, 322 F. Supp. 238 (W.D. N.C. 1970) (motion picture obscenity statute making criminal the exhibition of "obscene or

immoral" films); Oestreich v. Hale, 321 F. Supp. 445 (E.D. Wis. 1970) (ordinance prohibiting distribution of publications containing demoralizing or otherwise "immoral" language tending to corruption of morals).

The foregoing cases make it clear that the proscription of "immoral conduct" by the Missouri statute is so vague that "men of common intelligence must necessarily guess at its meaning and differ as to its application." That statute must therefore be invalidated as being violative of the due process clause of the Fourteenth Amendment.

II. IN FAILING TO CONSIDER THE EFFECT OF THE ALLEGED ACTIONS OF MS. KIMBLE ON HER FITNESS TO TEACH, THE MISSOURI COURT OF APPEALS UNCONSTITUTIONALLY APPLIED THE MISSOURI STATUTE.

Even if this Court finds M.A.S. § 168.114.1(2) not to be unconstitutionally vague on its face, it should find that it was unconstitutionally applied in such a manner as to deprive Ms. Kimble of her due process rights under the Fourteenth Amendment. The court did not adequately find that Ms. Kimble's actions adversely affected her ability to teach. Such a finding is a prerequisite for dismissal of a teacher on the ground of immorality.

In Thompson v. Southwest School District, supra, the court held that the phrase "immoral conduct" in the statute was unconstitutionally vague and violative of the Fourteenth Amendment unless applied in such a

way as to require that conduct be shown which renders the teacher unfit to teach.

In the present case the weight of the evidence shows that the alleged actions of Ms. Kimble in no way affected her fitness to teach. Several of Ms. Kimble's fellow teachers testified that the alleged incidents had no effect on her fitness to teach. (See A-76 to A-85) On the other hand, the administrators, who had an axe to grind against Ms. Kimble because of her constitutionally protected C.T.A. activities, spoke only in broad generalities, not explaining exactly how Ms. Kimble was rendered unfit to teach. (See A-86 to A-92)

Furthermore, Ms. Kimble had consistently received good evaluation reports, and her fellow teachers had honored her by electing her to a position of trust and confidence as

secretary/treasurer of the Community Teachers' Association. No explanation was given as to why, if the alleged incidents were so important, they were not of sufficient gravity to rate mention in Ms. Kimble's evaluation reports.

In other cases in which teachers have engaged in much more serious wrongdoing than the alleged activities of Ms. Kimble, courts have held that the teachers were improperly dismissed since there had been an inadequate showing of a nexus between the conduct and the teacher's fitness to teach.

For example, in Golden v. Board of Education of County of Harrison, 285 S.E.2d 665 (W. Va. 1981), it was held that a teacher who had pled nolo contendere to a charge of shoplifting had been improperly terminated on the basis of immorality. The Board had

adopted the view that conviction on the charge was per se immoral conduct and that it could dismiss the teacher if the Board members believed that her act was inconsistent with good order and proper personal conduct. This view was rejected by the court which examined the evidence and concluded that it was insufficient to show that the teacher was unfit to teach. The only evidence in the record before the Board relating to fitness to teach was the favorable testimony of fellow teachers and the principal and assistant principal. In the present case, although there is testimony that the teacher's alleged actions have caused some problems, the testimony is couched in very general terms without specific facts to back it up. On the other hand, several teachers specifically testified that the alleged

misconduct had no effect on Ms. Kimble's fitness to teach.

A similar conclusion was reached in Hoagland v. Mount Vernon School District, 95 Wash. 2d 424, 623 P.2d 1156 (1981) (an appeal by a teacher who had been dismissed by a school board after a felony conviction for having purchased a stolen motorcycle. The court, in remanding the case for an evidentiary hearing, held that the key question was whether the alleged misconduct had any effect on the fitness to teach. Noting that the danger to be avoided is an improvident dismissal and its consequences, the court referred to the following language from Wojt v. Chimacum, 9 Wash. App. 857, 516 P.2d 1099, 1103 (1973):

> Where a teacher is discharged because of classroom deficiences, the consequences are severe. Chances of other employment in the profession are diminished, if not eliminated. Much time,

> effort, and money has been expended by the teacher in obtaining the requisite credentials. It would be manifestly unfair to allow a discharge for a teaching or classroom deficiency which is readily correctable.

Like Ms. Kimble, the teacher in Hoagland continued to teach after completion of the alleged wrongful activity, during which time he received the support and encouragement of his students, their parents, and other teachers and members of his community. Unlike the teacher in Hoagland, Ms. Kimble has not even been convicted of a crime. In fact, the evidence is conflicting as to whether she in fact committed any of the alleged wrongs.

If the termination of the teachers in Hoagland and Golden, who had committed much more serious offenses than those allegedly committed by Ms. Kimble, was erroneous

because of failure to show a nexus between the conduct and fitness to teach, then certainly the termination of Ms. Kimble was erroneous where there was conflicting evidence as to whether she had engaged in the misconduct, and, even if she had, the misconduct was much less severe than that in Hoagland or Golden. Thus, M.A.S. § 168.114.1 (2) was unconstitutionally applied in violation of the due process clause of the Fourteenth Amendment.

III. TERMINATION OF MS. KIMBLE BY THE SCHOOL BOARD WAS IN RETALIATION FOR HER EXERCISE OF HER RIGHT TO FREEDOM OF SPEECH AND THEREFORE RAISES A FEDERAL QUESTION OF PARAMOUNT IMPORTANCE RELATING TO THE FIRST AND FOURTEENTH AMENDMENTS.

This Court in Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 506 (1969), in holding that teachers have the right to speak freely stated:

> It can hardly be argued that teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.

In numerous other cases courts have stressed the importance of freedom of speech in the teaching profession in our democratic society. Since scholarship cannot thrive in an atmosphere of suspicion and distrust it is essential that teachers be able to speak out freely without fear of retaliatory dismissal. See Sweezy v. New Hampshire, 354 U.S. 234

(1957). Similarly, in Kleindeinst v. Mandel, 408 U.S. 753, 763 (1972), this Court stated that "the right to freedom of speech is nowhere more vital than in our schools."

It has therefore been held that a teacher cannot be dismissed for exercising his or her legitimate First Amendment right to protest conditions existing within the school system. Perry v. Sinderman, 408 U.S. 593 (1972); Pickering v. Board of Education, 391 U.S. 563 (1968).

The circumstances leading up to the dismissal of Ms. Kimble clearly show that the main reason for her dismissal was to retaliate for her exercise of her right to freedom of speech. Since a right under the First and Fourteenth Amendments is involved, an important federal question is presented as to whether her dismissal was proper.

In November 1981, immediately upon hearing of Ms. Kimble's inquiry of the School Board President as to the reason why the C.T.A. dues of the administrators in the School District were paid by the School Board but the dues of the teachers were not, evidence shows that the Superintendent summoned Ms. Kimble to his office, threatened to take her teaching certificate, and told her he would love to slap her with an unprofessional conduct suit. (See A-93 to A-95) Thereafter, he stated he was going to get rid of Ms. Kimble, and in February 1982 the Superintendent brought a statement of charges against her. (See A-61 to A-65)

All of the charges were of a very trivial nature and consisted primarily of accusations that Ms. Kimble, between the years 1973 to 1982, took and later returned

various extremely inexpensive items from the school premises, thereby engaging in "immoral conduct." Another charge was that she ordered a book without having signed a request form.

All of the circumstances indicate that the real reason she was discharged was her constitutionally protected inquiry of the School Board President, and the other charges were mere pretexts.

This Court, in Mount Healthy City Board of Education v. Doyle, 429 U.S. 274 (1977), held that in deciding whether a dismissal is proper, courts must ascertain whether the teacher would not have been dismissed but for her protected activity. Under circumstances similar to those present here, courts in a number of cases have held dismissals of teachers to have been improper.

For example, in Hickman v. Valley Local School District Board of Education, 619 F.2d 606 (6th Cir. 1980), a board had decided not to renew a teacher's contract after the teacher had engaged in various union activities. The final list of reasons for nonrenewal included a number of incidents including allegedly improper playground supervision, guiding the building inspectors on a tour, calling in the County Supervisor on a teacher's salary dispute, taking a missing policy book, and refusing to meet with the principal in conference without another teacher present. The court noted that a decline in the teaching evaluation was directly traceable to the teacher's union activities, which constituted protected speech, and held that but for those activities the teacher would not have been

dismissed.

Similarly, in the present case there is a correlation between Ms. Kimble's protected speech and the decline in her ratings as a teacher, and since the other allegations of misconduct are so trivial in nature, the evidence strongly suggests that she would not have been dismissed but for her exercise of her right to freedom of speech.

Other cases reaching a similar conclusion include Ayers v. Western Line Consolidated School District, 691 F.2d 766 (5th Cir. 1982) (teacher's demurrers about administering two tests and her peripheral involvement with a knife-shakedown incident were found to be mere pretexts for the real reason for dismissal, which was the teacher's criticisms that the school's hiring policies were racially discriminatory; court relied on

inconsistencies in testimony and the fact that the alleged reasons for dismissal were trivial in nature); Simineo v. School District No. 16, Park County, Wyoming, 594 F.2d 1353 (10th Cir. 1979) (notice denying teacher automatic salary increase stated, as grounds therefor, that plaintiff failed to make satisfactory progress, failed to cooperate with other teachers, lacked enthusiasm, and failed to submit reports on time; these were found, based on sudden negative changes in evaluations, to be mere pretexts for the real reason for the penalty --her criticism of changes in teaching methods); Bertot v. School District No. 1, Albany County, Wyoming, 522 F.2d 1171 (10th Cir. 1975) (since list of reasons for non-renewal of contract all related to fact that teacher had helped underground newspaper get

started, teacher held to have been erroneously terminated); Jordan v. Cagle, 474 F. Supp. 1198 (N.D. Miss. 1979) (list of reasons for failure to rehire plaintiff held to be either based on constitutionally protected speech, patently without substance, or merely pretextual, and therefore, evidence showed that teacher was improperly terminated for criticism of school officials for changing regulation which allowed teachers to work at election polls); Johnson v. Butler, 433 F. Supp. 531 (W.D. Va. 1977) (reasons advanced for dismissal of teacher were trivial and were of such a nature as to neither individually nor collectively justify dismissal which was held to have therefore been based on a complaint she made concerning her room assignment).

The present case is distinguishable from

Connick v. Myers, 103 S. Ct. 1684 (1983), in which this Court recently held that a public employee's discharge did not violate her right to speak freely. There the employee, an Assistant District Attorney, shortly after being informed that she was to be transferred to prosecute cases in a different section of the criminal court, distributed a questionnaire she had prepared concerning office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressure to work in political campaigns. This Court held that this speech was not in relation to a matter of public concern, as a teacher's speech must be to be protected by the First Amendment, but only referred to matters of purely personal interest. She wanted to "gather ammunition for another

round of controversy with her supervisors." 103 S. Ct. at 1691.

In contrast, in the present case the question asked by Ms. Kimble did not relate solely to her own personal interest but was for the purpose of putting all teachers on an equal footing with administrators in regard to payment of C.T.A. dues. There was no uniquely personal purpose as there was in Connick. Ms. Kimble's speech related to a matter of pulic concern and was protected speech for which her discharge violated the First Amendment.

IV. SINCE THE DECISION WHICH WAS ADVERSE TO MS. KIMBLE WAS REACHED BY THE BOARD AND THE COURT BELOW WITHOUT CONSIDERING IMPORTANT EVIDENCE SUPPORTING MS. KIMBLE WHICH WAS LOST OR MISPLACED BY THE BOARD, MS. KIMBLE'S IMPORTANT RIGHT TO DUE PROCESS WAS VIOLATED.

The decisions below which were adverse to Ms. Kimble were reached without consideration of important evidence which could have led to a decision favorable to her. In Board of Regents v. Roth, 408 U.S. 564 (1972), this Court held that under the Fourteenth Amendment permanent teachers with indefinite contracts such as Ms. Kimble, have a property interest in continued employment of which they should not be deprived without due process of law. The circumstances in this case show that the Board and courts below failed to consider important evidence which was favorable to Ms. Kimble and therefore her right to due process under the Fourteenth

Amendment was violated.

Ms. Kimble, through her attorney, submitted to the Board her cancelled checks from the period of time in which she was alleged to have taken twenty dollars in gate receipts and to have subsequently replaced it by writing a check. She has attested to the fact that none of the checks was written to the school in the amount of twenty dollars. (See A-70 to A-73) However, when the Board began to consider the evidence, one of the twenty dollar checks from that period was missing. After the adverse decision by the Missouri Court of Appeals, several bank employees signed affidavits attesting to the fact that no checks were written by Ms. Kimble to the school. (See A-66 to A-69)

Had the Board been able to examine all of the twenty dollar checks introduced into

evidence it probably would have made a different decision on the evidence before it. It may have found that there was no pattern of continuing behavior and that Ms. Kimble was not untruthful either with the school personnel or at the hearing.

In numerous cases courts have held that failure of a tribunal to consider significant evidence amounts to a violation of due process. Cases decided in the criminal context should equally apply in the teacher termination context because of the great interest at stake. Analogous authority is Thompson, supra, in which the court held that because of the penal nature of teacher termination statutes, they should be governed by the same standard that is used for determining whether criminal statutes are unconstitutionally vague. Similarly, in

Goldberg v. Kelly, 397 U.S. 254 (1970), this Court held that the rights of confrontation and cross-examination apply not only in criminal cases but also in all types of cases where administrative actions are under scrutiny. Certainly, given the importance of the interest at stake, the due process requirement that all relevant evidence which has been submitted be considered applies in proceedings relating to the termination of the employment of a teacher.

The circumstances here are analogous to those present in Steinmark v. Parratt, 427 F. Supp. 931 (D. Neb. 1977), in which the court held that the defendant had been denied due process in part because critical evidence had been excluded and the defendant had thereby been frustrated in his efforts to develop his theory of lies and prejudice of a

paid informer. The Court relied on Chambers v. Mississippi, 410 U.S. 284, 302 (1973), which requires that an accused be given "a trial in accord with traditional and fundamental standards of due process."

This Court in United States v. Nixon, 418 U.S. 683, 711 (1974), held: "It is the manifest duty of the courts to vindicate [due process rights], and to accomplish that it is essential that all relevant and admissible evidence be produced." Cf. United States v. Kasto, 584 F.2d 268, 272 (8th Cir. 1978), cert. denied, 440 U.S. 930 (1979) ("Fifth Amendment right to due process of law requires that the accused be permitted to introduce all relevant and admissible evidence"); Hughes v. Mathews, 576 F.2d 1250, 1259 (7th Cir.), cert. dismissed, Israel v. Hughes, 439 U.S. 801 (1978)

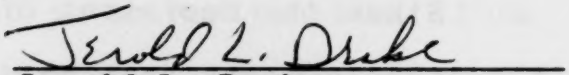
(defendant has due process right "to present relevant and competent evidence in absence of valid justification for excluding such evidence); Clark v. Reid, 441 F.2d 801, 804 (5th Cir. 1971) ("to deny a defendant a fair opportunity to present competent proof in his defense constitutes a denial of fair trial and of due process").

Since the decisions of the Board and the Court below might very well have been different if all of the evidence had been considered, it is clear that Ms. Kimble has been denied her fundamental right to due process, and certiorari should be granted to review those decisions since questions of paramount constitutional significance are presented.

CONCLUSION

For the foregoing reasons this Court should grant a writ of certiorari to the Missouri Court of Appeals, Western District, and set the matter for plenary consideration.

Respectfully submitted,



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NO.

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CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1984

MARY ELLEN KIMBLE
Petitioner,

v.

THE WORTH COUNTY R-III BOARD
OF EDUCATION
Respondent.

WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS,
WESTERN DISTRICT

APPENDIX

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IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

MARY ELLEN KIMBLE,	)	
	)	
Plaintiff-Respondent,	)	No. WD 34,022
	)	
VS.	)	
	)	
THE WORTH COUNTY R-III BOARD OF EDUCATION	)	
	)	OPINION FILED:
	)	
Defendant-Appellant.	)	MARCH 20, 1984

APPEAL FROM THE CIRCUIT COURT OF
WORTH COUNTY, MISSOURI

Honorable Montgomery L. Wilson, Judge

BEFORE SOMERVILLE, P.J., NUGENT AND LOWENSTEIN, JJ.

Following a public hearing pursuant to § 168.118, RSMo 1978, Mary Ellen Kimble, a "permanent teacher", was found by The Worth County R-III Board of Education to have engaged in "immoral conduct" (§ 168.114.1(2), RSMo 1978), and her indefinite contract was terminated. An appeal was taken to the Circuit Court of Worth County which reversed

the decision of The Worth County R-III Board of Education (hereinafter Board) and ordered that Mary Ellen Kimble (hereinafter Kimble) be reinstated, returned to permanent teacher status, and entitled to compensation for the period suspended from work.

The matter reaches this court on an appeal by the Board from the judgment entered by the Circuit Court of Worth County. The circuit court reversed the decision of the Board on the grounds that it "was arbitrary, capricious and unreasonable", constituted "an abuse of discretion", and "was unsupported by competent and substantial evidence upon the whole record." The circuit court further held "that there was not competent and substantial evidence upon the whole record . . . that the alleged 'immoral conduct' rendered the teacher unfit to teach or that the

teacher's teaching ability was adversely affected in any way." Parenthetically, the judgment of the circuit court evaporates insofar as having any bearing on judicial review at the appellate level due to strictures imposed thereon in contested administrative cases, infra.

Section 168.120(2), RSMo 1978, provides that an appeal from the decision of the Board shall be governed by the provisions of Chapter 536. In terms of administrative review this was a contested case (§ 536.010(2), RSMo 1978) and therefore the scope of review for both this court and the circuit court is statutorily prescribed by § 536.140, RSMo 1978.[1]

Review of contested administrative cases has been judicially addressed on numerous occasions. Reference is made to the following cases in the context of the instant

appeal. Neither the circuit court nor this court reviews the decision of the Board de novo. Michler v. Krey Packing Co., 363 Mo. 707, 253 S.W.2d 136, 141 (banc 1952). This court does not review the decision of the circuit court; to the contrary, each reviews the decision of the Board. Edmonds v. McNeal, 596 S.W.2d 403, 407 (Mo. banc 1980). Although all evidence before the Board is considered on judicial review, both the circuit court and this court are precluded from substituting their judgment on the evidence and neither may set aside the Board's decision unless it is unsupported by competent and substantial evidence on the whole record or is otherwise invalid. Harrod v. Board of Education, 500 S.W.2d 1, 6 (Mo. App. 1973). The evidence must be considered in the light most favorable to the Board's decision,

together with all reasonable inferences which support it. Id. Determination of the credibility of witnesses is a function of the Board and entitled to deference on judicial review. Meredith v. Board of Education, 513 S.W.2d 740, 745 (Mo. App. 1974). If evidence before the Board warranted either of two decisions, the Board's decision is binding on judicial review, and it is irrelevant that there may be supportive evidence of an opposing view. Hanebrink v. Parker, 506 S.W.2d 455, 458 (Mo. App. 1974). Inclusion within the scope of judicial review of contested cases that the administrative decision must be supported by competent and substantial evidence on the whole record (§ 536.140.2 (3), RSMo 1978), is rooted in Art, V, § 18, Constitution of Missouri (as amended 1976). By reason of its constitu-

tional heritage, determination of whether an administrative decision in a contested case is supported by competent and substantial evidence on the whole record is of magnum importance.

The Board relies on one point on appeal, namely, its decision was supported by competent and substantial evidence on the whole record when reviewed in accordance with attendant judicial guidelines addressing the scope of judicial review. Kimble counters the Board's position on a variety of grounds. One, the Board's decision was not supported by competent and substantial evidence on the whole record. Two, "immoral conduct" as prescribed by § 168.114.1 (2), supra, is unconstitutionally vague in violation of Amendments V and XIV of the Constitution of the United States and Art. I, § 10, of the

Constitution of Missouri; moreover, the incidents relied on, in any event, did not constitute "immoral conduct". Three, the purported instances of "immoral conduct" did not render her unfit to teach. Four, the doctrine of laches barred two of the three incidents found by the Board to constitute "immoral conduct." All of the aforementioned grounds were raised by Kimble before the Board and reasserted in her petition for review in the circuit court.

The charge levelled against Kimble which culminated in termination of her indefinite contract by the Board was predicated upon three instances of alleged "immoral conduct" within the ambit of § 168.114.1 (2), supra. The three incidents constituting "immoral conduct", supra, were as follows: that during the 1973-74 school year a teapot which

was a prop in a school play was returned by Kimble after word was disseminated that it was missing; that during the 1976-77 school year she took $20 from gate receipts collected at a basketball game, although she refunded the money after being confronted about the matter; and that in February, 1982 she took a set of books belonging to the school district, indicated that they had never been received from the vendor when confronted about them, and then subsequently returned them to the school library. It is appropriate to note at this juncture that in a pedagogic context, Kimble served as teacher-librarian.

The Board made detailed findings of fact substantiating all three incidents set forth in the charge as constituting "immoral conduct", and, additionally, that her conduct

with respect thereto "required extra precautionary measures to supervise her", "had a negative effect on the student relationship and teacher relationship existing in The Worth County R-III School District", and that continuance of her employment "creates additional administrative and supervisory burdens as well as distrust among the staff and faculty and has an adverse and detrimental effect on the students, faculty and the educational process of The Worth County R-III School District."

As frequently occurs in contested cases, a close perusal of the instant record in toto reveals its share of contradictory evidence, conflicting inferences, and divergent theories. Be that as it may, when the whole record is considered in light of the attendant principles governing the scope of judi-

cial review of contested administrative cases, the conclusion is inescapable that the findings and decision of the Board were supported by competent and substantial evidence on the whole record and do not reflect that the Board abused its discretion or acted in an arbitrary, capricious or unreasonable manner. Any natural impulse for reviewing courts to substitute their judgment on the evidence for that of the administrative tribunal in contested cases has a momentum of its own which must be held in check.

Attention now focuses on whether the Board's decision was otherwise invalid by reason of any of the other infirmities attributed to it by Kimble. Her contention that the statutory basis (§ 168.114.1 (2), supra) upon which the Board's decision necessarily rested was "unconstitutionally vague", there-

by rendering it invalid, is laid to rest in Ross v. Robb, 662 S.W.2d 257, 259 (Mo. banc 1983):

> "In Thompson v. Southwest School District et al., 483 F. Supp. 1170 (W.D. Mo. 1980), the plaintiff, a teacher dismissed from service for engaging in 'immoral conduct,' alleged that section 168.114.1(2), RSMo 1978, was impermissibly vague and denied her due process of law. The court agreed that, in the abstract, the phrase 'immoral conduct' was constitutionally suspect under the strict standards of construction to be employed in criminal and first amendment contexts. Id. at 1179. The court went on to say, however, that the phrase was part of a statutory scheme; that, construed with the other subsections of the statute, the phrase is 'capable of being given a more precise judicial construction so as to avoid the vagueness issue.' Id. at 1180. The court concluded that immoral conduct relates to conduct rendering a teacher unfit for the performance of his duties. Id. More precisely, the court found that immoral conduct means 'conduct rendering plaintiff unfit to teach.' Id. at 1181. This analysis persuades denial of Ross's constitutional challenge." (emphasis added)

The foregoing logically brings this court to Kimble's bifurcated argument that the incidents relied on did not constitute "immoral conduct", and, even if subject to being so construed, failed to render her unfit to teach. This argument is soundly refuted by competent and substantial evidence permeating the whole record supporting both the conduct alleged and the fact that such rendered her unfit to teach, thus meeting the test of "immoral conduct" set forth in Ross v. Robb, supra. The taking of property belonging to another without consent, notwithstanding its return when confronted with such wrongdoing, breaches even the most relaxed standards of acceptable human behavior, particularly so with regard to those who occupy positions which bring them in close, daily contact with young persons of

an impressionable age. It is eminently proper to note that Kimble, in addition to her duties as librarian, taught "library" an "reference" skills at the elementary level o a regular basis, and on an incidental basis at the high school level.

Failure to invoke separate charges when each of the first two incidents occurred doe not unequivocally suggest they were considered de minimis or condoned, and any attempt to do so places them in a false perspective. All three incidents were relie on to show a continuing pattern of behavior which crested when the final incident occurred in February of 1982 immediately following which charges were lodged resultin in termination of Kimble's indefinite contract. Any argument that reliance upon the first two incidents was indicative of an

arbitrary, capricious and unreasonable attitude on the part of the Board is negated when all the incidents are collectively viewed as evidencing a pattern of continuing behavior.

Kimble's final contention, that the first two incidents relied upon should have been barred by the doctrine of laches, and failure to so treat them tainted the Board's decision with incurable prejudice, is unpersuasive. Admittedly, the first of said incidents occurred during the 1973-74 school year and the second occurred during the 1976-77 school year.

Assuming, arguendo, that the doctrine of laches is applicable in contested cases before administrative tribunals, reference is had to its salient principles. There is no fixed period within which a right or claim must be asserted in order that it avoid being

barred by laches; temporal limits are drawn in light of the circumstances of the particular case; mere delay, in and of itself, does not constitute laches; laches is a question of fact to be determined from all the evidence and circumstances adduced at trial; laches cannot be invoked to thwart right or justice, but only to defeat resultant prejudice, if not invoked, to one asserting it; and he who asserts laches carries the burden of proof. Metropolitan St. Louis Sewer District v. Zykan, 495 S.W.2d 643, 656-57 (Mo. 1973).

Prejudice which supports laches generally falls into one or the other of two categories, i.e., (1) loss of evidence which would support the position of one seeking to invoke laches with regard to the claim he is called upon to defend against, and (2) a

change of position by one seeking to invoke laches in a way that would not have occurred but for the delay. Rich v. Class, 643 S.W.2d 872, 877 (Mo. App. 1982).

Kimble does not claim that she was prejudiced by a change of position on her part due to delay in filing charges against her regarding the first two incidents. In terms of prejudice in its broadest sense, any delay is susceptible of the inference that the Board did not precipitously file separate charges on each of the first two incidents, but out of deference to Kimble abstained from doing so until a continuing pattern of behavior was evinced.

Kimble raises her claim of prejudice in an evidential context. Prejudice in an evidential frame of reference contemplates a loss of demonstrative evidence or the un-

availability of witnesses which or who could support the position of one seeking to invoke the doctrine of laches. Powell v. Zuckert, 366 F.2d 634, 638 (D.C. Cir. 1966). The burden of proof thereon rested on Kimble, which she failed to sustain. She neither asserted nor attempted to prove the loss of any demonstrative evidence which would have aided or benefited her. She neither asserted nor attempted to prove that any witnesses were unavailable who could have aided or benefited her. As a matter of fact all persons who were privy to the two incidents which she claims should have been barred by laches testified at the hearing. Moreover, the separate components which come into play in determining applicability vel non of the doctrine of laches must be balanced in each case by weighting each component in accor-

dance with the particular facts and circumstances presented. When such is done in the instant case the scales tip in favor of rejecting application of the doctrine of laches.

Cases involving termination of tenured teachers frequently project an aura of ambivalence, thereby giving indelible substance to the admonitory principle that courts sitting in judicial review should not substitute their judgment on the evidence in lieu of that of the decisional administrative body. The scope of judicial review of administrative decisions in contested cases is sharply etched and commands compliance in order to protect against unwarranted judicial excursions into matters exclusively within the province of the appropriate administrative tribunal. See Phipps v. School Dis-

trict, 645 S.W.2d 91, 95-96 (Mo. App. 1982).

On the basis of what has heretofore been said, this court holds that the decision and order of The Worth County R-III Board of Education should be, and hereby is, affirmed. Accordingly, the judgment of the Circuit Court of Worth County is reversed and the cause remanded with directions to the Circuit Court of Worth County to enter judgment affirming the decision and order of The Worth County R-III Board of Education.

Judgment reversed and cause remanded with directions.

RONALD L. SOMERVILLE
PRESIDING JUDGE

Lowenstein, J., concurs in opinion of Somerville, P.J.; Nugent, J., concurs in separate concurring opinion.

FOOTNOTES

[1]Section 536.140, RSMo 1978, insofar as here pertinent, reads as follows:

"1. The court shall hear the case without a jury and, except as otherwise provided in subsection 4, shall hear it upon the petition and record filed as aforesaid.

2. The inquiry may extend to a determination of whether the action of the agency

(1) Is in violation of constitutional provisions;

(2) Is in excess of the statutory authority or jurisdiction of the agency;

(3) Is unsupported by competent and substantial evidence upon the whole record;

(4) Is for any other reason, unauthorized by law;

(5) Is made upon unlawful procedure or without a fair trial;

(6) Is arbitrary, capricious or unreasonable;

(7) Involves an abuse of discretion. . . ."

IN THE MISSOURI COURT OF APPEALS

WESTERN DISTRICT

MARY ELLEN KIMBLE, Plaintiff/Respondent,	)	
vs.	)	No. WD 34,002
THE WORTH COUNTY R-III BOARD OF EDUCATION	)	Opinion Filed:
	)	March 20, 1984
Defendant/Appellant.	)	

APPEAL FROM THE CIRCUIT COURT OF
WORTH COUNTY, MISSOURI
FOURTH JUDICIAL CIRCUIT

Honorable Montgomery L. Wilson, Judge

BEFORE SOMERVILLE, P.J., NUGENT, J. AND LOWENSTEIN, J.

CONCURRING OPINION

I concur with Judge Somerville's able majority opinion but I respectfully disagree with the way it arrives at its conclusion.

Plaintiff is a tenured teacher and the

mother of two grown children. At the time of the hearing before the school board, plaintiff had been a teacher for over sixteen years. The teacher performance reports rendered each year by her superiors were good. In March, 1981, the report included these comments: "Does a fine job. Does a good job of teaching." Under the heading "Professional Characteristics" appears the comment, "Very co-operative in anything I've asked." Finally, the principal concluded with, "She is a fine librarian." Mrs. Kimble was the elected secretary-treasurer of the Community Teachers' Association. She and another teacher had founded and for three years had operated twice-yearly book fairs to raise money for the school library. She had been responsible for handling those funds.

In the fall of 1981 plaintiff's activity

on behalf of the teachers' association had brought her into sharp conflict with the Superintendent of Schools, Mr. Bruner, her chief accuser. Apparently he thought that Mrs. Kimble had personally appealed to individual school board members in violation of board policy. Mrs. Kimble testified that in her earlier confrontation with Mr. Bruner he had threatened to "have" her Missouri teacher's certificate, that he would see to it that she would never teach in their school again and had said, "You better watch everything you do from now on, because I would love to slap you with an unprofessional conduct suit." Mr. Bruner denied making those threats, but he testified that he had told Mrs. Kimble on November 19, 1981, that "any future problems of this nature would be handled by a dismissal procedure."

The statement of charges filed against Mrs. Kimble read as follows:

1. Immoral conduct as evidenced by your taking and continued lying concerning the circumstances surrounding the taking of a certain set of books, namely Through Golden Windows, from the Gum Drop Book Company, at Bethany, Missouri, on the 11th day of February, 1982, and continuing until said books were brought into the Elementary Principal's office of said school district by yourself on the 18th day of February, 1982.

Other instances involving your immoral conduct as set out above are as follows:

(a) The removal and subsequent return by you of the tea pot from the teacher's lounge during the 1973 - 74 school year.

(b) The removal and subsequent return of the battery jar in the 1974 - 75 school year.

(c) The shortage and subsequent replacement by you of gate receipts in the 1976 - 77 school year.

(d) The removal and subsequent return of Avon jewelry

> from the Elementary Library during the 1977 - 78 school year.
>
> (e) The removal of the cookbook from the teacher's lounge in the 1980 - 81 school year.
>
> As a result of the above course of conduct, you have proven yourself to be untrustworthy and have made it necessary to more closely supervise your school activities and responsibilities than is necessary with the rest of the teachers and this had adversely affected the normal operation of the educational system and its activities.
>
> . . . .
>
> You are hereby suspended with pay from this date from the active performance of your duties until a decision is rendered by the Board of Education.

All but three of these charges were dismissed prior to defendant's hearing.

Because of the deference this court must accord to the school board's decision, I agree with the majority that the whole record

includes competent and substantial evidence to support a finding that the plaintiff "is guilty of the immoral conduct of untruthfulness and taking property not her own without consent or permission."

The evidence adduced at the hearing was as follows.

The Teapot Incident:

During the 1973 - 74 school year, a teapot on loan to the school disappeared from a shelf in the teachers' lounge. A sign was placed in the lounge asking for its return. One day shortly thereafter, teacher Ann Waldeier was in the lounge and noted that the teapot was still missing. As she left the lounge, she noticed the plaintiff walking into the lounge with a manilla envelope under her arm. The envelope was not in the usual flattened condition. Ms. Waldeier continued

to watch the door to the lounge and saw that no one else entered or came out. From where she was standing she could not see the other door to the lounge. When the plaintiff came out of the lounge, Ms. Waldeier reentered and saw the teapot on the shelf and a manilla envelope in the trash.

Former Superintendent of Schools, Phil Burmeister, testified that he, Mrs. Kimble, Norma Maudlin, and Ann Waldeier met and discussed the return of the missing teapot. (Ms. Waldeier had testified that she was not present when Mr. Burmeister discussed the incident with the plaintiff.) According to Mr. Burmeister, Mrs. Kimble stated that she had found the teapot in the library. He asked her why she did not present the teapot to him "rather than just taking it into the lounge and leaving it." When asked about

Mrs. Kimble's response, he said "I don't remember any." Neither he nor anyone under his supervision had given Mrs. Kimble permission to take the teapot.

Mrs. Kimble testified that she did not remember anything about the teapot and that she never stole a teapot.

The Gate Receipts Incident:

During the 1976 - 77 school year, Judy Hoakison, a teacher, and the plaintiff worked together taking money for basketball games at the gate. At one of those games, Ms. Hoakison left the gate table and went into the gym for no longer than five minutes. She testified that when she left the table some gate receipts money was under the cash box. Upon her return, she saw Mrs. Kimble taking money "out from under the cash box and putting it into her purse." She equivocated

in her testimony whether she knew the money she saw Mrs. Kimble put in her purse was the same money that had been under the cash box. Ms. Hoakison admitted that her memory of the event was not as good now as it was at the time of the occurrence sometime in 1976-77.

Eldon Cowles, Superintendent of Schools in 1976-78 testified that he called Mrs. Kimble into his office about the gate-receipts incident. She denied that she ever took any monies from the receipts. She explained that she was making change for her child. Mr. Cowles said that a twenty dollar bill seen at an early count of the money was gone at the end of the game. Although he admitted that under their accounting system no way existed to confirm a shortage, his "impression [was] that the amount of money wasn't there." He testified that Mrs. Kimble

wrote a twenty dollar check to the school when confronted with the incident and that he considered the matter closed at that time. He stated, "It was understood between us that that was it. That took care of it."

The plaintiff testified that she never took monies from the gate receipts and that she did not find in her cancelled checks for December, 1976 and January, 1977, any twenty dollar check to the school. Her bank statements and checks for December, 1976 and January, 1977, were admitted into evidence. Although no twenty dollar check to the school was included in the exhibits, the December, 1976 bank statement shows that two twenty dollar checks were written. Only one of these twenty dollar checks is included in the exhibits.

The Book Incident:

The school board's evidence was as follows:

On Thursday, February 11, 1982, Mrs. Kimble went to the Gum Drop Bookstore in Bethany, Missouri. She selected three boxes of books worth approximately $400. One box contained a set entitled Through Golden Windows. The next morning, Mrs. Rose Findley, principal of the elementary school, and Marsha Scott saw this set in the library of the elementary school before school started that morning. On Monday, February 15, Mrs. Kimble called the bookstore and talked to Pam Fitzgerald, secretary of the firm. Mrs. Kimble told her that the set of Through Golden Windows, was not put into her car when she left the bookstore warehouse and that she did not have them when she got to

school. An unproductive search of the warehouse was made.

Patty Hall, another secretary, talked with Mrs. Kimble after she made her call to the bookstore. She told Patty Hall that she had not picked up the set of books in question and that she had called the bookstore and that they were going to send another set. Pam Fitzgerald related plaintiff's message to Gail Fitzgerald, one of the owners of the Gum Drop Bookstore. Ms. Fitzgerald checked with the warehouse workers. They said that plaintiff had taken the missing books and put them in her car herself. Ms. Fitzgerald then called the school unsuccessfully trying to reach Mrs. Kimble. She left a message with Betty Calhoun, a school secretary. The message read:

> Gum Drop Books called and said they couldn't find the books, Through Golden Windows. The boys that helped you load them said they could remember you carrying them to the car.

The plaintiff did not return Ms. Fitzgerald's call. Ms. Findley, the principal, became aware of the situation on Monday, February 15, when the message was brought to her. On February 18, Ms. Findley called the bookstore and brought plaintiff to the phone. Early in the conversation, Mrs. Kimble stated that she received only two boxes of books. Ms. Findley heard Mrs. Kimble say on the telephone, "No, they are not in the trunk," and "Let's not worry. They'll turn up somewhere." Ms. Findley contacted Superintendent Bruner on Wednesday, February 17, about the missing books. On Thursday, the 18th, after Mrs. Kimble's

telephone conversation with Ms. Fitzgerald, Mr. Bruner confronted the plaintiff with the problem. Her first statement was, "I don't know where they are." She also said that she had picked up three boxes of books in Bethany. Mr. Bruner indicated that he expected the books returned to the school. After the close of school that day, Mrs. Kimble went home and then returned to school and delivered the missing books to Ms. Findley.

Plaintiff's testimony regarding the book incident was as follows:

After she had purchased the books at the Gum Drop Bookstore and had them put into her trunk by the employees of the bookstore, she drove to St. Joseph and stayed overnight at her daughter's. A snow fell that night and she drove to school early the next day before the snow plows were out. By the time she got

to school, she had a severe headache. She asked another person to remove the books from the trunk and to put them in the library. Although very ill, she stayed at school all day. "Evidently," on her way out, she "picked up this box of Through Golden Windows to take them home, look at and catalog over the week-end," and she "evidently put it in the trunk of the car and went home." She went to bed and slept until the next morning. On Monday, she went down to look at the books in the library and the box was not there. She then called the bookstore and told them that they evidently did not get one box of the books when she was there on Thursday. She asked them to check and see if they were still down there. She then went to the office and told the school secretary to hold the bill because one of the boxes was not at

the school and that they needed to wait until they got it straightened out before they paid the bill. On occasion she took books home to catalog them. She did so to save the school sixty cents for catalog cards. She normally put the books in the back seat or in the seat beside her when she took them home. After being confronted by the principal about the missing books, she searched the library, the work rooms, and all of the teachers' rooms. She then went home and, although she knew they were not there, she looked all around home. As she was sitting down she thought, "Well, maybe they are still out in the car. So I went out and looked in the car again, and I looked in the trunk and that's where they were." She then brought the books back and returned them.

Evidence was also produced by the school

board that extra supervision of Mrs. Kimble was needed and that these incidents had a negative and detrimental effect on the students, faculty, and the educational process of the school district.

Discussion:

While I agree with the majority's ultimate finding that these incidents may be said to constitute "immoral conduct," § 168.114.1 (2)[1], rendering the plaintiff "unfit to teach," see Ross v. Robb, 662 S.W.2d 257, 259 (Mo. 1983) (en banc), I arrive at that conclusion for different reasons. None of the three complaints against Mrs. Kimble charge that she intentionally and wrongfully deprived the district of its property. Moreover, the majority apparently thinks that the school board is not required to prove that the teacher intentionally and wrongfully

deprived the district of its property, that any taking of the property would constitute immoral conduct. The court's opinion states that "[t]he taking of property belonging to another, notwithstanding its return when confronted with such wrongdoing, breaches even the most relaxed standards of acceptable human behavior, particularly so with regard to those who occupy positions which bring them in close, daily contact with young persons of an impressionable age."

Indeed, if one intentionally and wrongfully takes another's property, no matter what the value, such conduct would constitute "immoral" behavior. But, I cannot agree that any taking of property, particularly after it is later returned, constitutes immoral conduct. If so, a teacher could be discharged if he inadvertantly took a school pencil or a

book home, forgot about it for a week, and then returned it. Similarly, a teacher could be discharged if he intentionally took a school grade book home to compute his students' grades and later returned it to school. The former example illustrates a taking which lacks intent and the latter illustrates a taking which is not wrongful. The legislature, in enacting §168.114(2) could not have intended that such conduct would amount to immoral conduct warranting termination of a teacher's contract. Because this limited issue is one of statutory interpretation, a question of law, we are free to substitute our own judgment. See National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 851 (1944). Therefore, I would say that to hold the taking of property to constitute immoral

conduct, the court must be convinced that the taking was intentional and wrongful.[2]

Starting with that premise, the next issue is then whether or not competent and substantial evidence appears upon the whole record to support the conclusion that the plaintiff intentionally and wrongfully deprived the district of its property. See Harrod v. Board of Education, 500 S.W.2d 1, 6 (Mo.App. 1973); §536.140(3). This inquiry, unlike the earlier issue, is a mixed question of law and fact. And, "where the question is one of specific application of a broad statutory term in a proceeding in which the agency administering the statute must determine it initially, the reviewing court's function is limited." National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 851, (1044).[3]

The school board here determined that the plaintiff's acts constituted immoral conduct. I would affirm this determination for two reasons. In the first place, the whole record contains competent and substantial evidence to support the factual finding that the plaintiff intentionally and wrongfully deprived the district of its property. Next, the whole record also includes competent and substantial evidence to support the finding that the plaintiff was untruthful with school personnel and was untruthful at her hearing.

Finally, the record contains substantial evidence that plaintiff's conduct has rendered her "unfit to teach." Cf. Thompson v. Southwest School District, 483 F.Supp. 1170, 1182 (W.D.Mo. 1980) (where no evidence was

developed indicating that plaintiff's conduct rendered her unfit to teach).

ANTHONY P. NUGENT, JR., JUDGE

FOOTNOTES

[1]All sectional references are to Revised Statutes of Missouri, 1978.

[2]Fortunately, because the property in question in this case was of some value, although relatively slight, we need not address the moral philosopher's question whether taking of property of little or no value constitutes "immoral conduct."

[3]There the issue was whether news boys were "employees" of newspaper publishers as used in the National labor [sic] Relations Act. The NLRB refused to follow common-law tort rules in defining an "employee," and defined the term in the context of policies underlying the NLRB. They defined employees as any workers who need the Act's protection. The Supreme Court held that "as a matter of law, the common law approach would be wrong." But it left it to the Board to decide, as a question of fact, whether particular individuals were employees within the "need for protection" test. Thus the Court found that "the Board's determination that specified persons are 'employees' under this Act is to be accepted if it has 'warrant in the record' and a reasonable basis in law." National Labor Relations Board v. Hearst Publications, Inc., supra, at 860.

IN THE CIRCUIT COURT OF WORTH COUNTY, MISSOURI
DIVISION I

MARY ELLEN KIMBLE, PLAINTIFF,	)	
VS.	)	Case No. CV982-11CC
THE WORTH COUNTY R-III BOARD OF EDUCATION, RESPONDENT.	)	

JUDGMENT

Now on this 24th day of June, 1982, the court takes up and considers the above cause.

This is an action for dismissal of a tenured teacher for alleged immoral conduct pursuant to Section 168.114(1)(2) R.S.Mo. (1978). The plaintiff teacher requested a public hearing as permitted by Section 168.116 R.S.Mo. (1978). After a public hearing in accordance with Section 168.118 R.S.Mo. (1978) dismissal was ordered by the respondent Worth County R-III Board of Educa-

tion and the plaintiff teacher has appealed to this court (Section 168.120 R.S.Mo. 1978).

The charges against the teacher alleging immoral conduct were as follows, to-wit:

1. "The removal and subsequent return by you of the tea pot from the teacher's lounge during the 1973-74 school year."
2. "The shortage and subsequent replacement by you of gate receipts in the 1976-77 school year."
3. "Immoral conduct as evidenced by your taking and continued lying concerning the circumstances surrounding the taking of a certain set of books, namely Through Golden Windows, from the Gum Drop Book Company, at Bethany, Missouri, on the 11th day of February, 1982, and

continuing until said books were brought into the Elementary Principal's office of said school district by yourself on the 18th day of February, 1982."

After considering all the evidence in this case including the transcript of the public hearing held on March 23, 1982, and also the exhibits introduced at said hearing, this court finds that the decision of the respondent Worth County R-III Board of Education to dismiss the plaintiff teacher was arbitrary, capricious or unreasonable (Section 536.140(2)(6) R.S.Mo. (1978); that it involved an abuse of discretion (Section 536.140(2)(7) R.S.Mo. (1978); and that the alleged acts of immoral conduct were unsupported by competent and substantial evidence upon the whole record (Section 536.140(2)(3)

R.S.Mo. (1978). The court further finds that there was not competent and substantial evidence upon the whole record at the hearing on March 23, 1982, that the alleged "immoral conduct" rendered the teacher unfit to teach or that the teacher's teaching ability was adversely affected in any way.

It is therefore ordered that the decision of the Worth County R-III Board of Education be reversed and the teacher, Mary Ellen Kimble, be reinstated and restored to permanent teacher status and that she be entitled to receive compensation for the period she has been suspended from work, all in the manner provided by Section 168.120(4) R.S.Mo. (1978).

JUDGE

BEFORE THE WORTH COUNTY R-III
BOARD OF EDUCATION

Board of Education of Worth County
R-III School District

v.

Mary Ellen Kimble

FINDINGS OF FACT AND DECISION

The above cause came on for public hearing before the Board of Education of Worth County R-III School District March 23, 1982 at the request of Mary Ellen Kimble and said board having duly considered the evidence adduced and the demeanor and testimony of the witnesses presented and being fully advised in the premises makes the following findings and conclusions of law.

1. All the requirements prescribed in Sections 168.114 through 168.118, Revised Statutes of Missouri, 1969, as amended, were

fully complied with in these procedures and the hearing was held and conducted according to law.

2. It is stipulated that Mary Ellen Kimble is a permanent teacher under the terms of the Missouri "Teacher Tenure Act", Sections 168.102 through 168.130, Revised Statutes of Missouri, 1969 as amended.

3. Mrs. Kimble resigned her position with the Worth County R-III School District by letter dated February 19, 1982 and subsequently withdrew her resignation on the 20th day of February, 1982 which was received by the Board on the 21st day of February, 1982.

4. Mrs. Kimble was notified of the statement of charges filed against her by personally receiving said statement of charges March 1, 1982, all as required by subsections 1 and 3, 168.116 RSMo.

5. Thereafter on the 10th day of March, 1982, Mrs. Kimble requested a hearing on the statement of charges against her.

6. On March 22, 1982, Mrs. Kimble was notified, through her attorney, in further response to her request for information concerning the statement of charges, to delete from said statement of charges as originally issued paragraphs 1(b), 1(d), 1(e) and all of paragraph 2, including paragraphs 2(a) and 2(b).

7. March 23, 1982, at 7:30 P.M. a public hearing was held to hear evidence on paragraphs 1, 1(a) and 1(c) of the statement of charges filed against Mary Ellen Kimble.

8. This board finds from the evidence not disputed by Mrs. Kimble that she fully understood the charges as set forth in the statement of charges served on her March 1,

1982.

9. This board finds from the evidence that during the 1973-1974 school year, Mrs. Kimble was accused of taking a teapot from the teacher's lounge without permission; that Mrs. Kimble later returned the teapot to the teacher's lounge; that Mrs. Kimble was not truthful with the Superintendent of Schools during his investigation of the incident; that because of Mrs. Kimble's conduct, the Superintendent of Schools felt that he could not trust her, that Mrs. Kimble required special supervision and that Mrs. Kimble's conduct had a negative effect on the school system.

10. This board finds from the evidence that during the 1976-1977 basketball season, Mrs. Kimble, while selling tickets for a basketball game, took Twenty Dollars ($20.00)

from the gate receipts without permission and put it in her purse; that the next morning she was asked to meet with Superintendent of Schools, Eldon Cowles, at which time Mrs. Kimble paid back the Twenty Dollars ($20.00) to the Worth County School District; that Mrs. Kimble required special supervision and extra precaution had to be taken by the administration in regard to Mrs. Kimble in order to protect the Worth County School District.

11. The Board finds Teacher's Exhibits "L, M, N, O" inconclusive for the defendant because checks were missing that were listed on the bank statement.

12. This board finds from the evidence-that on February 11, 1982, Mrs. Kimble went to the Gumdrop Book Company in Bethany, Missouri, and got three boxes of books, one box of which contained Through Golden Windows,

for the Worth County R-III School District; that on February 12, 1982 Mrs. Kimble brought all three boxes of books into the Worth County R-III School Building; that on February 15, 1982, Mrs. Kimble called Gumdrop Book Company and told them that she had not received Through Golden Windows and further told the school secretary not to pay the bill as she had not received Through Golden Windows; that on February 18, 1982 Mrs. Kimble talked by phone to Gumdrop Book Company and told them that she had not received Through Golden Windows, that she had looked in her car and in her trunk and the books were not there; that from February 15, 1982 to February 18, 1982, Mrs. Kimble denied receiving three (3) boxes of books from Gumdrop Book Company.

13. This board finds from the evidence

that on February 18, 1982, Mrs. Kimble left the school building after the close of the school day, drove to her home and returned to the school building with the books, Through Golden Windows, which she delivered to the elementary principal.

14. This board finds from the evidence that Mrs. Kimble took without permission one box of books, a 10 volume set entitled Through Golden Windows belonging to the Worth County R-III School District and that Mrs. Kimble did not tell the truth to the Gumdrop Book Company, the school secretary and the Superintendent of Schools while they were trying to locate the missing books.

15. This board finds from the evidence that Mrs. Kimble is presently and has in the past been employed as librarian in the Worth County R-III School District working pri-

marily as elementary librarian and teaching elementary students and part time as high school librarian, that through Mrs. Kimble's position, Mrs. Kimble is in contact with the entire student body of Worth County R-III School District; that as librarian, Mrs. Kimble has a flexible schedule and more unsupervised or non-classroom time than the average faculty member employed by this School District.

16. This board finds from the evidence that each superintendent of schools from 1973 to present has been involved in incidents with Mrs. Kimble in which she has taken property from the Worth County School System without permission, that each superintendent has found Mrs. Kimble to be untruthful and each superintendent has been required to take extra precautionary measures to supervise

Mrs. Kimble.

17. This board further finds from the evidence that the conduct of Mrs. Kimble has a negative effect on the student relationships and teacher relationships existing in the Worth County R-III School District.

18. This board further finds from the evidence that the continued employment of Mary Ellen Kimble is not justified; that Mary Ellen Kimble is guilty of the immoral conduct of untruthfulness and taking property not her own without consent or permission; that the continued employment of Mary Ellen Kimble creates additional administrative and supervisory burdens as well as distrust among the staff and faculty and has an adverse and detrimental effect on the students, faculty and the educational process of the Worth County R-III School District.

Therefore on the 6th day of April, 1982, the Board of Education of the Worth County R-III School District did vote on the motion duly made and seconded to terminate the indefinite contract of Mary Ellen Kimble, effective this date, and said motion carried unanimously.

Mrs. Kimble's motion to dismiss the statement of charges and request for attorney fees are both denied.

_____
President

ATTEST

_____
Secretary

Received 9th day of April, 1982.

_____
Mary Ellen Kimble

I certify that I have on this 9th day of April, 1982, delivered a true copy of the attached Findings of Fact and Decision to Jerold L. Drake, attorney for Mary Ellen Kimble, at his request.

John C. Andrews
Attorney for Worth County
R-III School Board

NO. 65992

IN THE SUPREME COURT OF MISSOURI
No. WD 34022

May Session 1984

Mary Ellen Kimble, Plaintiff-Respondent,

vs. TRANSFER

The Worth County R-III Board of Education,
Defendant-Appellant.

Now at this day, on consideration of Plaintiff-Respondent's Application to transfer the above entitled cause from the Western District Court of Appeals, it is ordered that said application be, and the same is hereby denied.

STATE OF MISSOURI-SCT.

I, THOMAS F. SIMON, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1984, and on the 19th day of June, 1984, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson City, this 19th day of June, 1984.

_____ Clerk.

_____ D.C.

WORTH COUNTY SCHOOL DISTRICT R-III

Robert S. Bruner, Superintendent
Stephen Meyer, Secondary Principal
Rose Findley, Elementary Principal
Grant City, Missouri 64456

February 28, 1982

To: Mary Ellen Kimble

Subject: Statement of Charges - Suspension

You are hereby notified of the following charges filed against you by Robert S. Bruner, Superintendent of Schools, Worth County R-III School District, which are grounds for termination of your indefinite contract of employment with the school district.

1. Immoral conduct as evidenced by your taking and continued lying concerning the circumstances surrounding the taking of a certain set of books, namely

Through Golden Windows, from the Gum Drop Book Company, at Bethany, Missouri, on the 11th day of February, 1982, and continuing until said books were brought into the Elementary Principal's office of said school district by yourself on the 18th day of February, 1982.

Other instances involving your immoral conduct as set out above are as follows:

(a) The removal and subsequent return by you of the tea pot from the teacher's lounge during the 1973 - 74 school year.

(b) The removal and subsequent return of the battery jar in the 1974 - 75 school year.

(c) The shortage and subsequent replacement by you of gate receipts in the 1976 - 77 school year.

(d) The removal and subsequent return

of Avon jewelry from the Elementary Library during the 1977 - 78 school year.

(e) The removal of the cookbook from the teacher's lounge in the 1980 - 81 school year.

As a result of the above course of conduct, you have proven yourself to be untrustworthy and have made it necessary to more closely supervise your school activities and responsibilities than is necessary with the rest of the teachers and this has adversely affected the normal operation of the educational system and its activities.

2. Willful or persistent violation of, or failure to obey the school laws of this state or the published regulations of the board of education employing you by:

(a) Directly contacting, by written

and/or oral communications, the members of the Worth County R-III School District Board of Education specifically on or about November 18, 1981, February 19 and 20, 1982, all in violation of the published regulations of said Board of Education #204.7 and #405.7.

(b) On or about December 10, 1981, you ordered a book from Baker and Taylor Company without having a signed request form or purchase order in violation of published regulation of said Board of Education #203.3, page 4 of the Faculty Handbook for the Worth County R-III School District.

Please be advised that you are entitled to request a hearing on the charges filed against you, which hearing will be held on the 23rd day of March, 1982, at 7:30 P.M. in

the Superintendent's Office for Worth County R-III School District in Grant City, Missouri, if a request for a hearing is made.

In the event a request for a hearing on the charges is not requested by you or by someone on your behalf within ten days after receipt of this notice, your contract may be terminated by the Board.

You are hereby suspended with pay from this date from the active performance of your duties until a decision is rendered by the Board of Education.

Done by order of the Board of Education made the 28th day of February, 1982.

Robert S. Bruner
Superintendent of Schools
Worth County R-III School District

STATE OF MISSOURI)
) SS.
COUNTY OF WORTH)

AFFIDAVIT

Now comes Ocie L. Hughes , after being duly sworn, states upon her oath that she is an employee of the Citizens Bank of Grant City, Missouri, and that she has searched the records at said bank and found the following twenty dollar checks written by either Mary Ellen Kimble or Larry Kimble on their account at the bank from November 15, 1976, until January 15, 1977, to-wit:

1. One twenty dollar check signed by Larry Kimble dated November 17, 1976, to Larry King;
2. One twenty dollar check signed by Mary Ellen Kimble dated November 19, 1976, to Riteway;

3. One twenty dollar check signed by Mary Ellen Kimble dated December 27, 1976, to Kurtis Kimble.

_____

Title: Assistant Cashier

On this 2 nd day of April, 1984, before me personally appeared Ocie L. Hughes, to me known to be the person described in the foregoing instrument and also known by me to be an employee at the Citizens Bank of Grant City, Missouri, and who executed the foregoing instrument and acknowledged that she executed it as her free act and deed.

_____

Notary Public

My commission expires Aug. 30, 1984.

STATE OF IOWA)
) SS.
COUNTY OF RINGGOLD)

AFFIDAVIT

Now comes Virginia Main, after being duly sworn, states upon her oath that she is an employee of the Security State Bank, Mount Ayr, Iowa, and that she has searched the records at said bank and found the following twenty dollar checks written by either Mary Ellen Kimble or Larry Kimble on their account at the bank from November 15, 1976, until January 15, 1977, to-wit:

1. One twenty dollar check signed by Larry Kimble, dated December 24, 1976, to H & W Electric;
2. One twenty dollar check signed by Larry Kimble, dated December 13, 1976, to Algie Saville.

_____

Title:Bookkeeping Supervisor

On this 2nd day of April, 1984, before me appeared Virginia Main, to me known to be the person described in the foregoing instrument and also known by me to be an employee at the Security State Bank, Mount Ayr, Iowa, and who executed the foregoing instrument and acknowledged that she executed it as her free act and deed.

_____

Notary Public

My commission expires 9-8-85.

STATE OF MISSOURI)
) SS.
COUNTY OF WORTH)

AFFIDAVIT

Now comes Mary Ellen Kimble and Larry Kimble, of lawful age, and after being duly sworn state upon their oaths that at the school board hearing of March 23, 1982, their bank statements and cancelled checks were introduced into evidence and that said exhibit included the following cancelled checks in the amounts of twenty dollars each for the period of time from November 15, 1976, to and including January 15, 1977, to-wit:

A. Security State Bank, Mount Ayr, Iowa:

1. One $20.00 check signed by Larry Kimble dated December 24, 1976, to H & W Electric for plumbing;

2. One $20.00 check signed by Larry Kimble dated December 13, 1976, to Algie Saville for fish; and

B. Citizens Bank of Grant City, Missouri:

1. One $20.00 check signed by Larry Kimble dated November 17, 1976, to Larry King for labor;

2. One $20.00 check signed by Mary Ellen Kimble dated November 19, 1976, to Riteway for groceries;

3. One $20.00 check signed by Mary Ellen Kimble dated December 27, 1976, to Kurtis Kimble, her son.

Your affiants state that all of said checks [ALL CHECKS WRITTEN DURING DEC. 1976 L.L.K.] together with the bank statements were entered into evidence at the school

board hearing and that there were no $20.00 checks to the Worth County School District.

Mary Ellen Kimble

Larry Kimble

Subscribed and sworn to before me this 31st day of March, 1984.

Notary Public

My commission expires June 12, 1984.

Transcript of March 23, 1982, Hearing Before Worth County R-III Board of Education.

JUDY HOAKISON

a witness, being first duly sworn, testified upon her oath as follows:

. . . .

EXAMINATION

BY MR. ANDREWS:

Q Would you state your name, please.

A Judy Hoakison.

Q What is your address?

A Creston, Iowa.

Q What is your occupation?

A Now I'm substitute teaching.

Q Were you ever employed in Worth County R-III School District?

A Yes, I was.

Q During what years were you employed

here?

A I was here from 1975 until 1977, taught two years.

Q During that time, did you perform other duties other than teaching?

A Yes.

Q Did you ever work on the gate for basketball games?

A Yes, that was part of our duties.

Q And who would you work with on that?

A Another teacher.

Q And what other teachers did you work with?

A I worked with Mrs. Kimble.

Q Now what year was that?

A That was during 1976 and 1977, during the basketball season of that year.

MR. ANDREWS: Can all of the Board hear the witness?

CHAIRMAN LAMBERT: Just barely.

Q (By Mr. Andrews) How did that ordinarily operate when you were taking gate with another teacher?

A You had the cash box which they had, the Superintendent brought it for us at the gate. And you took the money as the people came in and made the change.

Q Was there any time during the evening that you would, one of you would leave the table?

A That night there was. There was a drawing of some kind and one of us had to go into the gym.

Q Who went into the gym?

A I went into the gym.

Q What, if anything, unusual occurred?

A When I left there was some money underneath the cash box and when I returned, Mrs. Kimble was putting the money in her

purse and the money under the cash box was gone.

Q How did it affect the way you dealt with other teachers?

A Well, I was still friendly with the other teachers. It didn't have that much with the other teachers. I still visited with Mrs. Kimble, too.

Q Have there been problems where you taught before such as that?

A No.

Q Is there a difference in the behavior of the teachers in the way they conduct themselves?

A Will you reword that, please.

Q Have you noticed a difference in the other schools that you have taught at as opposed to this school since that incident occurred?

A Well, just the -- you mean the attitudes between the teachers and relationships of the teachers?

Q Yes.

A Well, I've always got along. See, I haven't taught -- I taught half-time and I got along wonderfully with the teachers and it wasn't any problem.

. . . .

ANNE WALDEIER

a witness, being first duly sworn, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. ANDREWS:

Q State your name, please.

A Anne Waldeier.

Q And what is your occupation?

A Vocational home economics teacher.

Q How long have you been employed in this school?

A Sixteen years, I think.

Q And how long has Mrs. Kimble been on the staff?

A I think about the same. Longer, I think she was here when I came.

Q Do you recall the 1973-74 school year?

A Yes, parts of it.

Q Do you recall whether or not they had a school play that year?

A Yeah.

Q Do you know who provided the props for that play?

A Various individuals, I guess.

Q And do you know where the props were kept?

A On stage and in the teacher's lounge.

Q What, if anything, are you aware of that

happened which was unusual concerning any of the props that were kept in the teacher's lounge.

A A teapot disappeared.

Q Where was this last seen?

A On a book shelf in the teacher's lounge.

Q What was done in an effort to get that returned?

A On my part?

Q No, just on the part of the school personnel as far as you know?

A A sign was put up in the lounge stating that the teapot belonged to Lucille Maudlin and it was of no value to anyone else except for her and please return it.

Q Was the sign up for a period of time?

A Yes.

Q Did it seem to be important to the

school that it be returned?

A I would say it was important to an individual.

Q And when was it returned?

A I can't say. I don't know.

Q Do you know whether it returned?

A Yes. I don't know as what particular time or how long or anything after it disappeared.

Q Would you tell this Board what you recall about the return of that teapot?

A I was in the lounge and had noted that it was not there. I left the lounge and as I was leaving, I noticed Mrs. Kimble walking into the lounge carrying something and as I walked on to my room, stopped in the hall, and I noted that she came back out and I immediately went back up to the lounge and the teapot was

on the shelf.

Q Now what did you do -- excuse me, what did you see that Mrs. Kimble had at the time that she entered the door to the lounge?

A Just something under her arm.

Q What something? Can you be more definite than that?

A I recall it as being like a manilla mailing envelope.

Q Isn't ordinarily a mailing envelope pretty flat?

A Yes.

Q Was it in that condition?

A No, I'd say it was -- no.

Q When did you see that mailing envelope next?

A In the trash can.

Q Where?

A In the teacher's lounge.

Q At the same time that you observed the teapot?

A Yes.

Q During the time that you were gone from the door to the lounge, were you able to see who was coming and going.

A From the hall, yes.

Q Was that all the time that Mrs. Kimble was in that door.

A Yes.

Q Did you see anyone else enter that door?

A No.

Q Did you see anyone else leave that door?

A No.

MR. ANDREWS: I believe that is all I would have.

CROSS-EXAMINATION

BY MR. DRAKE:

Q And who has access to the lounge?

A All personnel.

Q Personnel, you mean teachers?

A Well, janitors, I presume.

Q Is it kept locked?

A No, sir.

Q So anyone can come in and go?

A Yes.

Q And as I understand your testimony, you have no knowledge with regard to any taking of a pot?

A No.

Q What you are talking about is a pot being replaced?

A Yes.

Q How many doors are there to the lounge?

A Two.

Q And so that a person can come into the lounge from different directions?

A Yes.

Q Did Mary Ellen ever tell you she took that pot?

A No.

Q And I know you mentioned that you saw the manilla envelope, but you didn't see the teapot under her arm?

A No.

Q And is it possible that there would be something else, could have been something else in that envelope besides the teapot?

A Yes.

Q Did you or anyone else file a complaint against Mary Ellen, when was this, 1973?

A I'm not sure, '74 or '75, I think. A

long time ago.

Q But you didn't file a complaint against her?

A No.

Q To your knowledge, no one else did?

A No.

Q Is Mary Ellen a good librarian?

A As far as I know, yes.

Q As far as you know, is she a good teacher?

A Yes, I don't know -- that's not my job.

Q Do you know of your own knowledge how this teapot incident affected her teaching ability and librarian ability?

A I'd say no, no.

Q You know of no way in which this incident affected her ability to teach and perform her duties as librarian?

A No.

* * * *

ROSE FINDLEY

a witness, being first duly sworn, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. ANDREWS:

Q Would you state your name, please.

A Rose Findley.

Q And what is your occupation?

A I'm Educator/Elementary Principal of the Worth County R-III Schools.

* * * *

Q Now how did the actions of Mrs. Kimble affect your duties as Elementary Administrator?

A Well, each administrator is advised of things that they must be aware of and, of course, it added a caution to your

job. Being aware that there might be a problem existing, you were more alert to that problem than you would have been otherwise.

. . . .

ROBERT BRUNER

a witness, being first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. ANDREWS:

Q Would you state your name, please.

A Robert Bruner.

Q And what is your occupation?

A Superintendent of Schools, Worth County R-III.

Q How long have you been involved in education?

A Thirteen years and nine of those in

school administration.

Q How long have you been Superintendent here at Worth County R-III?

A This is my fourth year.

* * * *

Q And what has the conduct of Mrs. Kimble in this instance -- what effect has that created upon the faculty of the school system?

A Anytime that there is something of this nature among the faculty members having to do with the faculty member, it creates -- it can create some friction among faculty members and break down on the close knit faculty that a faculty should be; and, of course, eventually down the line a quality educational program is not going to be achieved.

Q What effect specifically has her conduct

made necessary?

A It's made necessary, based on the teapot and the gate receipt incident, that when I first came to this school system, I had heard this and I, of course, instructed both the building principals that I expected close supervision in all people and especially Mrs. Kimble. I like to protect the teachers as well as I like to protect everybody else because the gate receipt is a good example.

I like to have two people setting there and setting there all times so there will not be any accusations thrown against one specific teacher if something does end up missing.

Q Are there any other problems that this has created?

A Well, it's created problems for myself

because I don't like to have to go through this because it just disrupts everything in the school system. Kids know what's going on. The staff members know what's going on and it disrupts the school.

PHIL BURMEISTER

a witness, being first duly sworn, testified upon his oath as follows:

DIRECT EXAMINATION

BY MR. ANDREWS:

Q State your name.

A Phil Burmeister.

Q What is your occupation?

A Superintendent of Schools.

Q And how long have you been employed in that occupation?

A This is my eleventh year.

Q Were you ever employed by the Worth County R-III School District?

A Yes, I was.

Q And during what years?

A From 1973-74 through 1975-76.

Q What position did you hold at that time?

A Superintendent of Schools.

* * * *

Q What was the effect of Mrs. Kimble's conduct upon the faculty and your supervision during the time you were here as a result of the teapot incident?

A Well, the immediate effect was, of course, a lot of discussion on the part of the faculty about whether Mrs. Kimble did or did not take things in general, the teapot specifically, and, of course, in a small community and in a school of

our size, that discussion I'm sure, had an effect on student relationships as well as teacher relationships.

As her supervisor, I was not her direct supervisor, but it did have an effect on the way in which her super-vision -- supervisor concluded actions for and about Mary Ellen Kimble.

Q Was this effect a good effect or a bad effect for the teaching situation?

A Well, we tried to get along with the situation that we felt was apparent. As to whether it was good or bad, I don't know. It was a negative effect, a definite negative factor in relationships that were occurring inside this school.

MARY ELLEN KIMBLE

the teacher, being first duly sworn, testified upon her oath as follows:

DIRECT EXAMINATION

BY MR. DRAKE:

Q Would you give your name to the Board, please.

A Mary Ellen Kimble.

. . . .

Q How long have you been a teacher at Worth County R-III?

A In January, it was sixteen years.

* * * *

Q Had [Mr. Bruner] on any prior occasion ever threatened you with an unprofessional conduct suit?

A Yes.

Q When was that, approximately?

A It was in November. We had a C.T.A. meeting and the question was raised at that meeting.

Q Mary Ellen, I am going to ask you not to go into that since that is not one of the charges. I'm just interested in the statement that was made.

A Okay. He called me into his office and he closed the door. When he closes the door, you know you've had it. He closed the door and he said, I don't know, something to the effect that I had talked to the School Board members. I had not gone through proper channels. I had talked to School Board members and he didn't like that, and I told him that I would talk to Kenneth Lambert anytime I wanted to about anything I wanted to. And he jumped up out of the chair and leaned across his desk and shook his finger at me. And he said, "If you do, I'll have your Missouri Teaching

Certificate. I'll see that you never teach in this school again," and he said, "You better watch everything you do from now on, because I would love to slap you with an unprofessional conduct suit."

Q Kenneth Lambert is your neighbor, is that right?

A Has been for quite a while.

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No. 84-398

In the Supreme Court of the United States

October Term, 1984

MARY ELLEN KIMBLE,
Petitioner,

vs.

THE WORTH COUNTY R-III BOARD OF EDUCATION,
Respondent.

ON WRIT OF CERTIORARI
TO THE MISSOURI COURT OF APPEALS
WESTERN DISTRICT

BRIEF FOR THE RESPONDENT

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BEST AVAILABLE COPY

QUESTIONS PRESENTED

1. Should this Court grant jurisdiction of Petitioner's Petition for Certiorari under the facts and circumstances as set out in Petitioner's Brief?

2. If this Court should grant jurisdiction in this matter, is the Missouri statute in question unconstitutionally vague?

3. If this Court should grant jurisdiction in this matter, did the court below adequately determine that there was a nexus between the teacher's misconduct as determined by the Board of Education and her fitness to teach?

4. If this Court should grant jurisdiction in this matter, was the termination of the teacher in retaliation for her exercise of freedom of speech, thereby violating the First and Fourteenth Amendments?

5. If this Court should grant jurisdiction in this matter, was the adverse decision below violative of the Petitioner's due process rights because certain items which Petitioner claimed were important evidence were not considered by the lower court?

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ON WRIT OF CERTIORARI
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WESTERN DISTRICT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The citations to the opinions below are given in the Petitioner's Brief (p. 1). In addition, the text of the opinions below are set out in the Appendix heretofore filed by Petitioner. Rather than filing an additional Appendix, which would seem to be an unduly burdensome procedure, Respondent would adopt Petitioner's Appendix and merely ask the Court to consider pages 169 and 170 of the transcript of the hearing before the School Board in addition to the portions of that transcript set out in Petitioner's Appendix A-73 *et seq.* The portion that the Respondent wishes the Court to consider will be set out in the appropriate Argument section in this Brief.

JURISDICTION

Petitioner has invoked jurisdiction of this Court pursuant to 28 U.S.C. § 1257(3)(1976). It is Respondent's position that this Court should not accept jurisdiction under said Section and under the Rules of this Court. 28 U.S.C.A., U. S. Sup. Ct. Rule 17.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

In addition to the Constitutional provisions and statutes specified at page 3 of Petitioner's Brief, this case also involves 28 U.S.C.A., U. S. Sup. Ct. Rule 17.1, which reads as follows:

> "A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> "(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.
>
> "(b) When a state court of last resort has decided a federal question in a way in conflict with

the decision of another state court of last resort or of a federal court of appeals.

"(c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

STATEMENT OF CASE

Petitioner's statement of the case does set out generally the history of this matter from the School Board hearing through the Supreme Court of Missouri's refusal to transfer the cause from the Missouri Court of Appeals. However, as is often the situation in a matter of this nature, Petitioner falls into argumentative modes of statement at various stages. For instance, on page 6 of Petitioner's Brief, Petitioner indicates that "evidence" showed that certain statements were made by the Superintendent to Petitioner. Petitioner fails to point out that this evidence was that of her own testimony and that at least a portion of that evidence was refuted by the Superintendent in his testimony. On pages 7 and 8 of Petitioner's Brief, Petitioner indicates that the Statement of Charges filed against Petitioner is set forth. That is correct with the exception that a number of those charges were dismissed by stipulation of Petitioner's attorney and Board counsel prior to the hearing. Only the teapot incident in 1973-74, the gate receipts incident in 1976-77 and the incident involving the set of books in 1982 were involved in the hearing. On page 8 of Petitioner's Brief, Petitioner raises the totally unwarranted and argumentative statement that "circumstances therefore strongly indicate that Ms. Kimble was dismissed because of her constitutionally

protected speech, . . ." and then Petitioner goes on to state that her brief before the Missouri Court of Appeals brought out the argumentative position that the administrators that testified in the hearing had an axe to grind because of the Petitioner's activities with the local teacher's association.

At the bottom of page 9 of Petitioner's Brief, it is stated that a check which Petitioner deems to be important to the case disappeared while "in the possession of the Board". This is a misstatement of the facts and evidence of the matter by Petitioner and will be taken up by Respondent in Argument.

At page 10 of the Brief, Petitioner fails to point out that the affidavits signed by bank employees were filed with the Missouri Court of Appeals after that court received written briefs, heard oral argument on the case, and made its decision. These affidavits were filed in connection with a motion for rehearing.

SUMMARY OF RESPONDENT'S ARGUMENT

Petitioner's writ should be denied because the court below upheld the validity of the state statute in question. Certiorari should not be granted unless there is a not insubstantial claim that the federal law requires a different result than that reached by the state court. The Supreme Court will not review a federal question that is raised for the first time in seeking review of a completed state proceeding. A federal issue that is presented for the first time in a motion for new trial, appeal, or motion for rehearing is raised too late. The state court judgment below rests on adequate grounds.

ARGUMENT

I. SHOULD THIS COURT GRANT JURISDICTION OF PETITIONER'S PETITION FOR CERTIORARI UNDER THE FACTS AND CIRCUMSTANCES AS SET OUT IN PETITIONER'S BRIEF?

Petitioner would urge jurisdiction of this certiorari review by the Supreme Court pursuant to 28 U.S.C. § 1257 (3). However, Petitioner has misread that statute because subsection (2) of the same section provides for review by appeal where is drawn in question the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaties or laws of the United States, and the decision *is in favor of its validity.* That is exactly what happened in the case at hand as a review of the decision of the lower court will show. In other words, a portion of the teacher tenure statute of the State of Missouri, § 168.114 Mo. Ann. Stat., was determined to be valid and constitutional.

It, therefore, follows that 28 U.S.C. § 1257(3), pertaining to certiorari review, provides for review only if the state decision is against the validity of a state statute. See Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: "Jurisdiction and Related Matters," § 4012, pp. 602, 603.

The threshold procedural requirement for Supreme Court review is that the tendered federal questions have been presented to the state courts. Many decisions announce the rule that the Supreme Court will not consider questions that are raised for the first time in seeking review of completed state proceedings. This requirement is most immediately founded on the statutory provision for

review of federal matters that have been "drawn in question" or "specially set up or claimed". There is no difficulty in applying this principle so long as no effort has been made to present the issue to the state courts. See Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: "Jurisdiction and Related Matters," § 4022, p. 696 and 28 U.S.C. § 1257(3). *Cardinale v. State of Louisiana*, 394 U.S. 437, 438 (1969).

Again from Wright, Miller, Cooper & Gressman, *Federal Practice and Procedure*: "Jurisdiction and Related Matters," § 4022, p. 701, we find:

> "Most and perhaps all of the cases that do not expressly invoke the test of the adequate state ground decisions have excused or penalized failures of presentation that would clearly be treated the same way under those tests. Ordinarily, the federal issue is presented too late if it is first raised in a motion for new trial, is raised for the first time on appeal, or is not presented with a clarity required by state appellate procedure or is not advanced until a petition for rehearing addressed to the decision of the highest appellate court. . . ."

Petitioner seeks to thrust upon this Court two arguments involving alleged federal questions which were not raised until Petitioner filed her alternative motion for rehearing or transfer in the appellate court below. Those questions are set out as numbers 3 and 4 on pages i and ii of Petitioner's Brief. The issues presented to the court below by Petitioner's Brief before that court are essentially set out in Petitioner's Questions For Review numbers 1 and 2 as set out on page i of Petitioner's Brief. The other arguments made by Petitioner for the lower court had to do with the weight of competent and substantial evidence produced at the School Board hearing and the ques-

tion of the applicability of laches. Neither of these arguments are raised in Petitioner's Brief before this Court and, of course, they should not be raised under the jurisdictional limits discussed above.

Petitioner tries to bring into the case her retaliation for exercise of freedom of speech argument through a quote from the Petitioner's Brief before the Missouri Court of Appeals on page 8 of Petitioner's Brief before this Court. That purely presumptive and assumptive quote is totally argumentative and self-serving since there was absolutely no evidence that any of the administrators involved in the hearing had an "axe to grind" because of Petitioner's activities with the teacher's association. That question came up under section III of the Points and Authorities in the brief before the lower court wherein Petitioner alleged that the decision to terminate her was not supported by competent and substantial evidence produced at the School Board hearing and there was no mention made whatsoever of any constitutionally protected speech or other federal question. Again, to bring that type of matter before the Court at this time is too little and too late.

There was not even a pretext of bringing Petitioner's fourth question presented for review before the lower court, that question being whether or not the lower court considered certain items of evidence, and its alleged violation of the teacher's substantive due process rights by failing to do so. That argument came up in Petitioner's motion for rehearing after the decision was rendered in the Missouri Court of Appeals and the affidavits of bank employees which commence on A-66 of the Appendix were first obtained by Petitioner at that time. Through the fault of Petitioner only, this argument was not presented to the Missouri Court of Appeals and denies jurisdiction of this Court accordingly.

II. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, IS THE MISSOURI STATUTE IN QUESTION UNCONSTITUTIONALLY VAGUE?

If this Court should decide to grant jurisdiction to this writ notwithstanding Petitioner's failure to comply with the statutes and rules pertaining to the requirement of finding of invalidity of a state statute and timeliness of presentation of a federal question, the only possible issue before the Court would be that first raised by the Petitioner-Teacher before the Board of Education and maintained through the circuit court hearing and the court of appeals hearing. That argument is set out in Petitioner's Questions Presented For Review numbers 1 and 2 and is argued as numbers I and II. However, there is one important exception which Respondent will take up shortly.

Petitioner would have this Court grant review on the basis that the Missouri statute in question, § 168.114.1(2) Mo. Ann. Stat., is constitutionally unfirm because of vagueness and that the decision below is in conflict with prior decisions of this Court and in conflict with a prior decision of a federal court of appeals. Petitioner's position is wrong and perhaps misleading in at least one respect. The only case of which Respondent has knowledge that would support Petitioner's position is a district court case arising out of Oregon in 1973, *Burton v. Cascade School District Union High School 5, et al.*, 353 F.Supp. 254, *aff'd*, 512 F.2d 850 (9th Cir.), *cert. denied*, 423 U.S. 839 (1975). It is true that the district court in that case reached a bare conclusion that a statute allowing for dismissal of teachers on grounds of "immorality" was unconstitutionally vague, citing the language set out on page 17 of Petitioner's Brief.

The *Burton* decision, which appears to Respondent to be the only decision declaring a teacher dismissal for immorality statute unconstitutionally vague, resulted in an award of damages and attorney's fees to the teacher. The teacher had asked for reinstatement to her former position and the court denied that request. The teacher appealed to the Ninth Circuit Court on that question and the School Board filed a cross appeal. Apparently the board appeal was dismissed for failure to file its brief and the Ninth Circuit, reasoning that the non-tenured teacher had no property interest in continuance of employment, affirmed the lower court decision. When we read Petitioner's argument on page 18 of her Brief, she would have us believe that the Ninth Circuit case conflicts with the lower court decision in the instant case. That is a completely wrong and misleading statement. The Ninth Circuit did not act upon the question of constitutionality of the statute but merely took up the question of reinstatement, therefore there is no basis for stating that the lower court decision in this case is in conflict with a decision of a court of appeals.

The whole range of legal issues involved in this case is discussed in a very exhaustive and learned monograph prepared by the National Organization of Legal Problems of Education.[1]

Even in the *Burton* case with its flat holding against the term "immorality", the district court was troubled and mentioned in footnote at page 255 the following:

> "1. ORS 342.530(1)(b) also presents serious constitutional problems because it does not require a nexus between conduct and teaching performance. *Mindel v. United States Civil Service Commission,* 312 F.Supp. 485 (N.D. Cal. 1970)."

---

1. Delon, F., "Legal Issues In The Dismissal Of Teachers For Personal Conduct", 1982.

It seems almost an afterthought that the district court stated that lack of showing of a nexus between teacher conduct and the teacher's ability or performance was suspect. The court's use of the footnote indicates that in 1970 it was considering the same basis which all other courts known to Respondent now consider in this type of case, *i.e.* "nexus".

Other cases cited by Petitioner in her argument really do not lend weight to her position. In *Grayned v. City of Rockford,* 408 U.S. 104, 108 (1972), we see this Court concerned with the constitutionality of anti-noise and anti-picketing ordinances as they affected demonstrations surrounding a school building. As a matter of fact, the anti-noise ordinance was upheld and the anti-picketing ordinance was overturned under the equal protection theory. Appellant had claimed that both ordinances were, on their face, vague and overbroad, and, therefore, unconstitutional.

The *Grayned* court said at page 109:

> "Although the question is close, we conclude that the anti-noise ordinance is not impermissibly vague. The court below rejected Appellant's arguments 'that proscribed conduct was not sufficiently specified and that police were given too broad a discretion in determining whether conduct was proscribed.' 46 Ill.2d at 494, 263 N.E.2d, at 867. Although it referred to other, similar statutes it had recently construed and upheld, the court below did not elaborate on the meaning of the anti-noise ordinance. In this situation, as Justice Frankfurter put it, we must 'extrapolate its allowable meaning.' Here, we are 'relegated . . . to the words of the ordinance itself,' to the interpretations the court below has given to analogous statutes, and, perhaps, to some degree, to the intepretation of the statute given by those charged with enforcing it. 'Ex-

trapolation', of course, is a delicate task, for it is not within our power to construe and narrow state laws."

The *Grayned* court went on at page 111:

". . . Were we left with just the words of the ordinance, we might be troubled by the imprecision of the phrase 'tends to disturb.' However, in *Chicago v. Meyer,* 44 Ill.2d, 4, 253 N.E.2d 400, 402 (1969), and *Chicago v. Gregory,* 39 Ill.2d 47, 233 N.E.2d 422 (1968), reversed on other grounds, 394 U.S. 111, 22 L.Ed.2d 134, 89 S. Ct. 946 (1969), the Supreme Court of Illinois construed a Chicago ordinance prohibiting, inter alia, a 'diversion tending to disturb the peace' and held that it permitted conviction only where there was '*imminent* threat of violence.'" (Emphasis supplied by Court.)

This Court went on to say that the Supreme Court of Illinois would probably interpret the Rockford ordinance to prohibit only actual or imminent interference with the peace or good order of the school. (*Id.*, pp. 111, 112.)

What the *Grayned* court was, in fact, saying was that the reviewing court must look to interpretations applied to statutes by the state courts since not every possible safeguard could be included in the statute itself.

The *Keyishian v. Board of Regents of University of State of New York,* 385 U.S. 589 (1967) case cited by Petitioner at page 14 of her Brief seems to be an overbreadth case and the application of the statute in that case had serious First Amendment freedom implications. The case, while having some general applicability to the matter at hand, is really not specifically in point.

Petitioner then proceeds to cite several cases on pages 15 and 16 of her Brief which are prior restraint cases. The *Holmby Productions, Inc. v. Vaughan,* 350 U.S. 870

(1955) case, *Superior Films, Inc. v. Department of Education of Ohio,* 346 U.S. 587 (1954) case, and *Commercial Pictures Corp. v. Board of Regents of University of State of New York,* 113 N.E.2d 502 (1953) case, are all censorship or board of review cases for moving pictures. The film censorship cases are not relevant or in point and do not require analysis in this Brief.

In the *Morgan v. City of Detroit,* 389 F.Supp. 922 (E.D. Mich. 1975) case cited on page 20 of Petitioner's Brief, the "lewd and immoral acts" which that court found to be deficient were acts of sexual immorality. The court found that no standards were offered as to what type of sexual conduct would be moral and which type would be immoral. Similarly, in the *Corporation of Haverford College v. Reeher,* 329 F.Supp. 1196 (E.D. Pa. 1971) case on page 20 of Petitioner's Brief, the district court in Pennsylvania determined that students should not have to be put to the test of divining which misdemeanors would involve "moral turpitude" and which would not.

On pages 21 and 22 of Petitioner's Brief, she throws in three final cases which purportedly would support her position that the Missouri statute is unconstitutional for vagueness. The case of *Ricks v. District of Columbia,* 414 F.2d 1097 (D.C. Cir. 1968), involved the troublesome area of vagrancy statutes. The District of Columbia ordinance in question had several sections, the one applicable here being apparently as follows: "3) Any person leading an immoral or profligate life who has no lawful employment and who has no lawful means of support realized from a lawful occupation or source."

The *Ricks* court said at page 1107:

> "Not only does the phrase under scrutiny fail to chart for the individual citizen the course that is proscribed, but it also fails to mark out reasonably dis-

tinct boundaries for the judges, juries, and police officers who are required to administer the law. . . ."

In Missouri, the various boards of education, the reviewing courts, and the appellate courts are required to apply the limiting factor of "unfitness to teach", as we shall see in the next part of this argument. A-11.

The case of *Gregory v. Gaffney,* 322 F.Supp. 238 (W.D. N.C. 1970), and the case of *Oestreich v. Hale,* 321 F.Supp. 445 (E.D. Wis. 1970), are both prior restraint cases that were found to be vague and overbroad.

The case which is of seminal importance in this area is *Morrison v. State Board of Education,* 461 P.2d 375, a case decided in 1969 by the Supreme Court of California, en banc. At page 386, we find the following:

"We, therefore, conclude that the Board of Education cannot abstractly characterize the conduct in this case as 'immoral', 'unprofessional' or 'involving moral turpitude' within the meaning of § 13202 of the Education Code unless that conduct indicates that the petitioner is *unfit to teach.* In determining whether the teacher's conduct thus indicates unfitness to teach the Board may consider such matters as the likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, the likelihood of the recurrence of the questioned conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon the constitutional rights of the teacher involved or other teachers. These factors are relevant to [387] the

extent that they assist the Board in determining a teacher's fitness to teach, i.e. in determining whether the teacher's future classroom performance and overall impact on his students are likely to meet the Board's standards." (Emphasis supplied.)

The petitioner in that case urged that the California statute under which he was charged was unconstitutional because the terms thereof, and particularly the term "immoral", were so vague as to constitute a denial of due process. The *Morrison* court recognized that it had itself in the past determined that the term "immoral" might well be unconstitutionally vague, but it also stated that such vagueness could be resolved by more precise judicial construction and application of the statute in conformity with the legislative objectives. (*Id.* at p. 389.)

The court stated at page 389:

". . . As we have explained above, the prohibitions against immoral and unprofessional conduct and conduct involving moral turpitude by a teacher constitutes a general ban on conduct which would indicate his unfitness to teach. This construction gives § 13202 the required specificity. Teachers, particularly in the light of their professional expertise, will normally be able to determine what kind of conduct indicates unfitness to teach. Teachers are further protected by the fact that they cannot be disciplined merely because they made a reasonable, good faith, professional judgment in the course of their employment with which higher authorities later disagree. . . ."

The federal district court for the Western District of Missouri in *Thompson v. Southwest School District,* 483 F.Supp. 1170, applied the very learned and extensive reasoning of the *Morrison* case, *supra,* to the Missouri statute when that statute was challenged by a teacher after being

suspended with pay because of the charge of immorality being brought against her by the school board. The district court considered the vagueness of the Missouri tenure statute specifically with regard to the term "immoral conduct" and cited the *Grayned* case, *supra*, 408 U.S. at 108-109, as holding:

> "Vague laws are offensive to notions of due process for a number of reasons. First, our judicial system has always insisted that laws give persons of ordinary intelligence an opportunity to know what conduct is prohibited so that they will have an opportunity to avoid that type of conduct. Secondly, if arbitrary and discriminatory enforcement is to be avoided, laws must provide explicit standards for those who apply them." (*Id.*, p. 1178.)

The court went on to say at page 1178:

> "Admittedly, not every statute which a reviewing court believes could have been drafted with greater precision is unconstitutionally vague. Because the Court is dealing with words, mathematical certainty can never be demanded nor expected." [Citing *Grayned, supra*, 408 U.S. at 110-111.] "However, legislation, particularly legislation imposing penalties, must fairly apprise those who are subject to its restrictions as to the proscribed conduct with a reasonable degree of certainty. *United States v. Thompson*, 603 F.2d 1200 (5th Cir. 1979). Thus, the standard test for determining whether the terms of a statute are sufficiently precise to comply with due process concepts is whether the statute gives the person of ordinary intelligence a reasonable opportunity to know what is prohibited so that he may act accordingly." [Again, citing *Grayned, supra.*]

The court stated that the unconstitutionally vague test is more stringently applied in criminal penalties or where First Amendment freedoms may be violated, holding that in those areas strict standards of definiteness have been imposed. (*Id.*, p. 1179.) The court found that civil as well as criminal statutes must be sufficiently clear to give fair warning and provide a standard against which conduct can be uniformly judged, particularly where penal civil statutes are to be construed. The court said that because of the penal nature of the Missouri statute and the property interest that a tenured teacher has under the indefinite contract provisions of the statute, it would set a standard for determining the unconstitutional vagueness of the statute in question which would be governed by tests set forth in criminal and First Amendment areas as opposed to less stringent tests applied to regulatory statute governing economic or commercial activities. (*Id.*, p. 1179.)

The court admitted that it had serious doubts as to the baldface term "immoral conduct" and cited the *Burton v. Cascade School District* case, *supra*.

Judge Clark then stated:

> "However, even for purposes of evaluating whether a sufficiently serious question going to the merits exists, the court hesitates to suggest the possible unconstitutionality of the state statute. It is well established that constitutional principles dictate that courts should refrain from passing on constitutional questions if there are alternative grounds such as statutory construction upon which the case might be decided.' (*Id.* at pages 1179, 1180.)

Then, in the heart of the decision, the court stated:

> "The court believes that the statute in question is capable of being given a more precise judicial con-

> struction so as to avoid the vagueness issue. If the term 'immoral conduct' is considered not in the abstract but in the overall context of § 168.114, Mo. Rev. Stat., it seems clear that the legislature intended to allow dismissal only in instances where immoral conduct adversely affected the teacher's performance." *Supra,* at 1180.

After relating other portions of § 168.114 Mo. Rev. Stat. which specifically allowed dismissing teachers for conduct unfitting them to instruct or associate with children or proscribed activities in the line of duty, the court determined that § 168.114.1 must be read in conjunction with § 168.114.2. The latter subsection sets out guidelines for evidence to be used in determining professional competency or efficiency. The court found that subsection clearly indicates that the language Petitioner complains of relates to grounds for dismissal wherein a teacher's competency has been affected.

At page 1180, the court found:

> "Thus, the court believes that the term 'immoral conduct' was intended in this context to relate to conduct which would render a teacher unfit for the performance of his duties. A number of other courts when faced with similar statutes have reached identical conclusions. . . ."

The court then cited the *Morrison* case, *supra,* and *Weissman v. Board of Education of Jefferson County School District, No. R-1,* 547 P.2d 1267 (1976), a case involving dismissal of a tenured teacher on the grounds of "immorality". See also *Reinhardt v. Board of Education,* 311 N.E.2d 710 (1974); *Gaylord v. Tacoma School District No. 10,* 559 P.2d 1340 (1977).

Then the court cited a litany of Missouri state cases which provided support for its holding.

The *Thompson* case, *supra,* was cited with approval by the Missouri Supreme Court in *Ross v. Robb,* 662 S.W.2d 257 (Mo. banc 1983), which was in turn cited by the lower court in this case. See Petitioner's Appendix A-11. The *Ross* court concluded "that immoral conduct relates to conduct rendering a teacher unfit for the performance of his duties" as taught by *Thompson, supra.*

So, the Missouri Court of Appeals, in the decision which Petitioner seeks review by this Court, followed the overwhelming majority of decisions in this country. Only the *Burton* case, *supra,* would appear to be contra. That fact is not sufficient to raise the jurisdiction necessary to grant certiorari.

III. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, DID THE COURT BELOW ADEQUATELY DETERMINE THAT THERE WAS A NEXUS BETWEEN THE TEACHER'S MISCONDUCT AS DETERMINED BY THE BOARD OF EDUCATION AND HER FITNESS TO TEACH?

We have heretofore discussed the requirement of nexus between proscribed acts of the teacher and the teaching performance itself. We have pointed out that the Missouri courts, through *Thompson, supra,* and *Ross, supra,* have followed this principle in Missouri. This principle was further followed by the School Board in the case at hand wherein it was found in paragraph 18 of the Findings:

> "[t]hat the continued employment of Mary Ellen Kimble creates additional administrative and super-

visory burdens as well as distrust among the staff and faculty and has an adverse and detrimental effect upon the students, faculty and the educational process of the Worth County R-III School District." See A-56.

The Missouri Court of Appeals found that, in the face of Petitioner's argument that her actions did not render her unfit to teach:

> "This argument is soundly refuted by competent and substantial evidence permeating the whole record supporting both the conduct alleged and the fact that such rendered her unfit to teach, thus meeting the test of 'immoral conduct' set forth in *Ross v. Robb, supra.* The taking of property belonging to another, without consent, notwithstanding its return when confronted with such wrongdoing, breaches even the most relaxed standards of acceptable human behavior, particularly so with regard to those who occupy positions which bring them in close, daily contact with young persons of an impressionable age. It is imminently proper to note that Kimble, in addition to her duties as librarian, taught 'library' and 'reference skills' at the elementary level on a regular basis, and on an incidental basis at the high school level." See A-12.

Golden v. Board of Education of the County of Harrison, 285 S.E.2d 665 (W.Va. 1981).

There is no doubt but that the nexus question was considered by both the Board of Education and the Missouri Court of Appeals and Petitioner's complaint that there was failure to consider the effect of the alleged actions is not appropriate.

Petitioner would urge upon the Court that statements of teachers and election to a post in the community teacher's

association would refute any nexus between conduct and fitness to teach. However, it should be remembered that the teachers did not have the duty of evaluating Petitioner and when the various administrators testified, the nexus was quite well established. Petitioner complains of and fails to establish some prejudice that the administrators of the School District had because of her community teacher's association activities. There was no evidence of this conflict whatsoever with the prior superintendents and the only evidence at the School Board hearing was the unsubstantiated testimony of Petitioner and the Superintendent of Schools, who recommended her termination.

Finally, Petitioner would seem to say that she would have to be convicted of a crime in order to be terminated for immoral activities. She cites the *Hoagland v. Mt. Vernon School District* case, 623 P.2d 1156 (1981), for that apparent position. It seems to Respondent that the severity of the action may not be extremely important, particularly if no nexus is established. However, in this case a nexus was established and as the Missouri Court of Appeals found, there was a pattern of continuing behavior exhibited by Petitioner. See A-14.

IV. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, WAS THE TERMINATION OF THE TEACHER IN RETALIATION FOR HER EXERCISE OF FREEDOM OF SPEECH, THEREBY VIOLATING THE FIRST AND FOURTEENTH AMENDMENTS?

Respondent has heretofore argued that this Court should not consider Petitioner's Argument III relating to alleged retaliation for exercise of freedom of speech rights, but out of an abundance of caution, Respondent will make some remarks relating to the argument presented by Petitioner in this area.

Because all testimonial and documentary evidence at the hearing before the Board of Education indicates that Petitioner was terminated because of several acts of taking things that did not belong to her and without the consent of the owner and lying about the circumstances, or at least not recalling the circumstances in the face of credible testimony by administrators and teachers, Petitioner would seek to require the Court to draw an inference that the reasons given for her termination were a pretext generated by the School Board to conceal retaliation for an exercise of a First Amendment right.

Petitioner offered no probative evidence to support this inference and, indeed, the argument was not presented to the Board of Education or the Missouri Court of Appeals.

Petitioner would offer her evaluation reports as a librarian to justify retaining her position in the teacher corps of the School District in the face of overwhelming substantive evidence of immoral conduct as set out in the charges and as determined by the School Board in its Findings of Fact. See A-48, *et seq.* No doubt a person of extremely unsavory character could have a good or even excellent evaluation as a teacher but if the immoral actions of that teacher are such as to render the teacher unfit to teach or to be associated with young people of an impressionable age, and if the presence of the teacher in the school environment is disruptive to the educational process, then there is little, if any, choice on the part of the School Board. Indeed, to retain such a teacher would be unthinkable.

Two of the charges of immoral conduct considered by the Board of Education occurred at a time preceding the alleged conversation between the Petitioner and the

School Board President. Both the Board and the Missouri Court of Appeals found the evidence of such incident to be against the position of the teacher. Thus, the "but for" test in *Mount Healthy City Board of Education v. Doyle,* 429 U.S. 274 (1977), was met.

The other cases cited by Petitioner on pages 34 through 39 of her Brief really do not add anything to the controversy at hand. Certainly, Respondent would agree with Petitioner that those cases stand for the proposition that the reasons given for dismissal were so trivial in nature that when compared to the constitutional rights of the teacher in each case, the charges were a mere pretext. Those cases primarily record a long history of constitutionally protected activities on the part of the teacher and extremely trivial charges in most cases. At any rate, the charges did not come close to the subject case where the teacher was charged with taking items which did not belong to her and lying about the circumstances.

V. IF THIS COURT SHOULD GRANT JURISDICTION IN THIS MATTER, WAS THE ADVERSE DECISION BELOW VIOLATIVE OF THE PETITIONER'S DUE PROCESS RIGHTS BECAUSE CERTAIN ITEMS WHICH PETITIONER CLAIMED WERE IMPORTANT EVIDENCE WERE NOT CONSIDERED BY THE LOWER COURT?

Petitioner claims that her due process rights were violated because an item of evidence was not considered by the Board of Education or by the Missouri Court of Appeals below. As pointed out in Argument I, Petitioner did not raise this alleged defect in her appeal from the Board decision but raised it for the first time in Petitioner's motion for rehearing which Respondent feels is

too late to invoke the jurisdiction of this Court. Again, out of an abundance of caution, Respondent will respond to Petitioner's position and say that Petitioner's complaint is not well taken. The School Board found that the Petitioner's exhibits were inconclusive for Petitioner because the bank statement contained missing checks. An earlier superintendent had received a $20.00 check from Petitioner as reimbursement to the School District for a $20.00 cash item that Petitioner had allegedly taken from gate receipts at a basketball game. See A-52.

Petitioner did not complain of this finding in her argument in the Missouri Court of Appeals and did not raise that position in her brief before that court. As stated before, this position was raised for the first time on the motion for rehearing when Petitioner sought to have several affidavits presented to the Missouri Court of Appeals from bank employees.

When we review the transcript of the hearing before the Board of Education, this matter becomes more clearly in focus. At page 169 of that transcript, we have the following:

> "Q —Now at my request, have you obtained all of your checks for December, 1976, and January, 1977?
>
> "A —Yes.
>
> "Teacher's Exhibits L through O were marked by the reporter for identification.
>
> "Q (By Mr. Drake) —Mary Ellen, these have been marked Teacher's Exhibits L, M, N and O. 'L' and 'M' is the bank account of your husband at Mount Ayr, is that right?
>
> "A —Right.

"Q —And 'N' and 'O' is your bank account at Grant City?

"A —Yes, but those are both joint accounts.

"Q —They are both joint accounts, and they were both in 1976 and 1977, is that right?

"A —Right, uh-huh.

"Q —And do you and your husband have any other bank accounts at all?

"A —No.

"(By Mr. Drake) —I offer Teacher's Exhibits 'L', 'M', 'N' and 'O' in evidence.

"(By Mr. Andrews) —What are those checks or what months?

"(By Mr. Drake) —Checks for December and January of 1976 and 1977.

"(By Mr. Andrews) —I have no objection.

"Q (By Mr. Drake) —Now, without going through each one of those checks and every one of those bank statements, we have just put them in evidence so the Board can review them if they wish. Did you find any $20.00 checks to the school?

"A —To the school, no."

Petitioner, through her attorney, offered the exhibits to the Board of Education and the same were received by the Board in a bulk fashion. After those exhibits were reviewed by the Board, it seems that one or more of the checks indicated on the bank statements were missing. Based upon this, the Board made its finding as stated above. Petitioner would now have the blame for the missing check or checks placed squarely on the shoul-

ders of the Board of Education and Respondent believes that this would not be appropriate action.

The cases cited by Petitioner on pages 43 through 45 of her Brief are not really in point since they go to the premise that an accused has the right to have critical evidence admitted and not excluded, that all relevant and admissible evidence be permitted to be introduced and presented by the accused and this does not fit the case at hand. Petitioner had the opportunity to present all relevant and competent evidence and apparently did so. The Board of Education merely considered the evidence presented and acted in a reasonable, justified manner.

It is clear to see that Petitioner has not been denied any fundamental right to due process and that there is no paramount constitutional significance presented in her argument.

CONCLUSION

For the above and foregoing reasons, this Court should overrule and deny the writ of certiorari to the Missouri Court of Appeals, Western District, and make such other orders as to the Court shall seem appropriate.

Respectfully submitted,

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